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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

J.D. FARMER, JR.,

Petitioner

v.

STEPHEN E. HIGGINS,
DIRECTOR, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Respondent

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether possession of a machinegun "under the authority of" the Department of the Treasury in 18 U.S.C. § 922(o) includes the making of a registered machinegun as authorized by the Secretary in 26 U.S.C. § 5822.

2. Whether Congress has power under Article I, § 8 of the Constitution to prohibit mere possession of a type of firearm by law-abiding citizens.

3. Whether § 922(o) infringes on the right of the people to keep arms guaranteed by the Second Amendment.



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**PETITION FOR A WRIT OF CERTIORARI TO THE
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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported as 907 F.2d 1041 (11th Cir. 1990). The opinion is reproduced in the Appendix (hereafter "App.") at 1a. The orders of the United States District Court filed on January 6, 1989 and December 15, 1989 are unpublished and are reproduced in App. 12a and 26a respectively.

JURISDICTION

On July 11, 1990, the Court of Appeals reversed the order of the District Court that defendant process plaintiff's application or issue the requested permit. On August 30, 1990, the Court of Appeals denied plaintiff's petition for rehearing and suggestion of rehearing (or hearing) in banc.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The text of the following constitutional provisions, statutes, and regulations are reproduced in the Appendix:

Article I, § 8, Cl. 1 & 3, U.S. Constitution

Second Amendment, U.S. Constitution

Preamble, Firearms Owners' Protection Act, § 1, P.L. 99-308, 100 Stat. 449 (May 19, 1986)

18 U.S.C. § 922(o)

18 U.S.C. § 925(a)(1)

26 U.S.C. § 5821

26 U.S.C. § 5822

26 U.S.C. § 5841

27 C.F.R. § 179.105

STATEMENT OF THE CASE

Proceedings in the Court Below

This case was filed on March 9, 1987, in the U.S. District Court for the Northern District of Georgia as an action for a declaratory judgment, judicial review, and a writ of mandamus to compel the Bureau of Alcohol, Tobacco and Firearms ("BATF") to approve an Application to Make and Register a Firearm pursuant to the National Firearms Act, 26 U.S.C. § 5822. The plaintiff, J.D. Farmer, Jr. resides in Smyrna, Georgia. The defendant, Stephen E. Higgins, is Director, Bureau of Alcohol, Tobacco and Firearms, U.S. Department of the Treasury.

Jurisdiction in the U.S. District Court was founded on Article III, Section 2 of the U.S. Constitution and 28 U.S.C. Section 1331 in that this case arises under the Constitution and laws of the United States, and is a con-

troversy to which the United States is a party; and on 28 U.S.C. Section 1361 in that a writ of mandamus was sought to compel an officer or employee of the United States to perform a duty owed to the plaintiff.

On January 6, 1989, the Honorable J. Owen Forrester rendered an opinion that 18 U.S.C. § 922(o) allowed the making and possession of machineguns under the National Firearms Act, but that a writ of mandamus was unavailable to require defendant to approve the application. App. 18a-25a. However, by order entered June 22, 1989, the court allowed the filing of the First Amended Complaint which alleged that denial of the application was arbitrary, capricious, and an abuse of discretion.

By order filed on December 15, 1989, the court reaffirmed that defendant's interpretation of § 922(o) was unreasonable, and ordered defendant to conduct a complete review of plaintiff's application or issue the permit. App. 33a.

The defendant appealed to the U.S. Court of Appeals for the Eleventh Circuit. On July 11, 1990, the Court of Appeals reversed, holding that § 922(o) precludes approval of the application. App. 9a. On August 30, 1990, the Court of Appeals denied plaintiff's petition for rehearing and suggestion of rehearing (or hearing) in banc. App. 10a.

STATEMENT OF FACTS

On November 24, 1986, plaintiff filed an Application to Make and Register a Firearm with the Bureau of Alcohol, Tobacco and Firearms (hereafter "BATF"). The purpose of this application was to enable plaintiff legally to make, register, and pay the tax on a machinegun pursuant to the National Firearms Act, 26 U.S.C. § 5821, 5822 and 5841, as well as legally to possess it pursuant to Georgia Code § 16-11-124.

Pursuant to 27 C.F.R. § 179.62 through § 179.64, plaintiff enclosed with the above application his fingerprints,

photographs, complete information for a background check by law enforcement, and the \$200 tax payment. The application was endorsed by Bill Hutson, Sheriff of Cobb County, Ga., who certified: "I have no information indicating that the maker will use the firearm or device described on this application for other than lawful purposes. I have no information that possession of the firearm described . . . on the front of this form would place the maker in violation of state or local law."

By letter dated February 7, 1987, Terry L. Cates, Chief, National Firearms Act Branch, BATF, acting on behalf of defendant, disapproved plaintiff's application. The sole basis of the disapproval of the application was that § 102 (9) of the Firearms Owners Protection Act of 1986, P.L. 99-308, codified as 18 U.S.C. § 922(o), as interpreted by defendant, prohibits possession by a private citizen of a machinegun made on or after May 19, 1986.

Apparently pursuant to the District Court's Order filed on December 15, 1989 (App. 26a), BATF conducted an investigation of Mr. Farmer and caused the FBI also to conduct an investigation. Mr. Higgins stated in his Declaration of February 6, 1990, p. 5 (attached to defendant's district court Motion for a Stay Pending Appeal): "[B]ATF has conducted a background check of the plaintiff which indicates that plaintiff would not be prohibited from making or possessing a machinegun on grounds other than the prohibition set forth in section 922(o)."

ARGUMENT

THE WRIT SHOULD BE GRANTED BECAUSE, UNLESS INTERPRETED BY ITS PLAIN MEANING, THE STATUTE WOULD BE THE FIRST BAN IN AMERICAN HISTORY ON MERE POSSESSION OF A TYPE OF FIREARM, CONTRARY TO ARTICLE I, § 8 OF THE CONSTITUTION AND THE SECOND AMENDMENT, AND CONTRARY TO THIS COURT'S *BASS* AND *MILLER* PRECEDENTS

The writ should be granted because the decision below upholds the first ban on firearms possession by law-abiding citizens in American history. To do so, the Court of Appeals strained the statutory language exempting possession "under the authority of" a department of the United States to preclude private possession authorized by the Department of the Treasury. The opinion illogically changes "under the authority of" to "for the benefit of."

United States v. Bass, 404 U.S. 336 (1971) held that ambiguous statutory language should not be interpreted to prohibit mere possession of firearms by felon, but should be interpreted to require an interstate commerce nexus. Article I, § 8, clause 3 of the Constitution delegates to Congress power over interstate commerce, not mere possession, which the Court found would be a dramatic intrusion upon traditional state criminal jurisdiction.

Even if Congress had power to ban mere possession under Article I, § 8, the Second Amendment protects the right of the people to keep arms from infringement. An absolute ban would violate this Bill of Rights guarantee. See *United States v. Miller*, 307 U.S. 174, 178 (1939).

Accordingly, the Court of Appeals has decided an important question of federal constitutional and statutory law which has not been, but should be, settled by this Court, and has decided fundamental questions (1) upsetting the federal-state balance that conflict with this Court's decision in *Bass*, and (2) in conflict with this Court's decisions that the Second Amendment protects

possession of ordinary military arms by the people, excluding felons.

I. FARMER IS ENTITLED TO MAKE THE FIREARM UNDER THE AUTHORITY OF THE DEPARTMENT OF THE TREASURY PURSUANT TO 18 U.S.C. § 922(o)(2)(A)

A. "Under the Authority of" in § 922(o) Includes "Authorization" Under the National Firearms Act

18 U.S.C. § 922(o)(2)(A) allows possession of a new machinegun "under the *authority* of, the United States or any department or agency thereof or a State. . . ." The National Firearms Act provides that "each . . . maker . . . of a firearm shall, prior to . . . making . . . a firearm, obtain *authorization* in such manner as required by this chapter or regulations issued thereunder to . . . make . . . the firearm, and such *authorization* shall effect the registration of the firearm required by this section." 26 U.S.C. § 5841(c).¹ The State of Georgia authorizes possession of a machinegun by one who is "*authorized* to possess the same because he has registered the machinegun . . . in accordance with the dictates of the National Firearms Act" Ga. Code, § 16-11-124.

District Judge Forrester's Opinion entered January 5, 1989 (App. 18a) explains the plain meaning of the phrase "under the authority of" as follows:

One observer has noted "[I]t is hard to say that a person who receives or transfers a firearm after 'the Secretary [of the Treasury] has approved the transfer' does not possess and transfer 'under authority of the United States, a department or agency thereof.'" Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMBERLAND L. REV. 585, 675 (1987). Apart from the com-

¹ "Upon receipt of the approved application, the maker is *authorized* to make the firearms described therein." 27 C.F.R. § 179.64.

mon and ordinary meaning attached to the phrase "under authority of," plaintiff points to other provisions of the GCA [Gun Control Act] wherein the phrase is used in the same context. *See, e.g.*, 18 U.S.C. §§ 922(a)(4), (a)(7), (a)(8), (b)(4); 925(d); *see also* 27 C.F.R. §§ 178.22(a)(3), (b); 179.26(a)(3), (b).

"Authority" generally means "permission," and "authorize" means in part "to permit a thing to be done in the future." *Black's Law Dictionary*, 168, 169 (1968). As noted, numerous provisions of the Gun Control Act other than § 922(o) use these terms in their ordinary meaning. *E.g.*, 18 U.S.C. § 922(a)(4), (b)(4) (interstate transportation and sale of a machinegun must be "as specifically *authorized* by the Secretary"); § 925(d) ("the Secretary *shall authorize*" importations).² Particularly notable is the provision distinguishing manufacture of certain ammunition "for the use of" the United States, the States, and their political entities, from manufacture for other (i.e., private) use "*authorized by the Secretary . . .*" § 922(a)(7), (a)(8).³

² In *Gun South, Inc. v. Brady*, 877 F.2d 858 (11th Cir. 1989), the court stated:

The [Gun Control] Act generally forbids the Secretary from *authorizing* the importation of firearms into the United States, 18 U.S.C.A. § 922(1) (West 1976). The Act, however, creates four narrow categories of firearms which the Secretary must *authorize* for importation. 18 U.S.C.A. § 925(d) (West 1976 and Supp. 1989). Under the only exception relevant to this controversy, the Secretary of the Treasury must *authorize* the importation of [sporting] firearms. . . . (Emphasis added.)

The court used the terms "authorize" and "authority" on at least twenty-seven (27) occasions in the opinion to describe the issuing and revocation of permits to import firearms by private persons. *Id.* at 860-64.

³ The regulations issued by defendant Higgins also use these terms to denote that a private action is "under the authority of" the department. *E.g.*, 27 C.F.R. § 178.22(a)(3), (b), and § 179.26(a)(3), (b) use the terms "approve," "authorization," "authority,"

"Under the authority of" means that the department has approved the making and possession, not that the making and possession is for the use of, or for the special benefit of, the government. 18 U.S.C. § 922(o)(2)(A) refers to "possession *by* or *under the authority of*" the United States or a department thereof. By contrast, 26 U.S.C. § 5852 states that a firearm "may be made *by*, or *on behalf of*, the United States, or any department . . . thereof" without payment of the making tax. The terms "under the authority of" are clearly broader than "on behalf of" or "for the use of".

At no point does the Court of Appeals explain either the meaning of "under the authority of" or the clear distinction between that statutory phrase and statutory phrases such as "for the use of" or "on behalf of". Nor does it suggest why "under the authority of" is logically restricted to machineguns possessed for governmental purposes.

In 27 C.F.R. § 179.105(c), defendant illogically interprets "under the authority of" to mean only machineguns manufactured "for sale or distribution to any department or agency of the United States" or "for exportation in compliance with the Arms Export Control Act (22 U.S.C. § 2778)" Defendant will approve an application to make a machinegun only if the gun "is particularly suitable for use by Federal, State or local governmental entities and that the making of the weapon is at the request and on behalf of such an entity." 27 C.F.R. § 179.105(e).

Clearly, nothing in the terms "under the authority of" as used in § 922(o) implies the above restrictions. Machineguns made "under the authority of" defendant would include not only those made for government entities and for export, but also the machinegun plaintiff

and "authorized" to describe permission for alternate record keeping. § 179.88(c) prohibits "a transfer to an *unauthorized* person"

herein, or any other qualified person, applies to make pursuant to the National Firearms Act.

In sum, the terms "under the authority of" simply mean as authorized by defendant pursuant to the National Firearms Act. Nothing in those terms implies a purpose restricted to governmental use.

B. The Preamble to the Firearms Owners' Protection Act Precludes an Intent to Ban Firearms

The District Court Opinion (App. 19a) found ambiguous floor remarks of little weight in view of the Preamble to the Firearms Owners' Protection Act, which states:

CONGRESSIONAL FINDINGS—The Congress finds that—

(1) *the rights of citizens—*

(A) *to keep and bear arms* under the second amendment to the United States Constitution;

(B) *to security* against illegal and unreasonable searches and seizures under the fourth amendment;

(C) *against uncompensated taking of property, double jeopardy, and assurance of due process of law* under the fifth amendment; and

(D) *against unconstitutional exercise of authority* under the ninth and tenth amendments;

require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) *additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private*

ownership or use of firearms by law-abiding citizens for lawful purposes.” § 1, P.L. 99-308, 100 Stat. 449 (1986). (Emphasis added.)

As the District Court concluded, “defendant’s proffered interpretation is inconsistent with this clear statement of legislative intent.” App. 20a. The Court of Appeals completely ignored the preamble to the Firearms Owners’ Protection Act.

C. As Government Use Was Already Exempt, the Court of Appeals Interprets the Exemption as a Meaningless Redundancy

The government and its suppliers were *already* exempted from the Gun Control Act by 18 U.S.C. § 925 (a) (1), which provides:

The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

As the District Court Opinion concludes: “Thus defendant’s interpretation of § 922(o) carries with it the implicit conclusion that Congress either overlooked the existence of the previous exemption or purposefully enacted a redundant provision without reference to the earlier and through significantly different statutory language.” App. 20a.

The Court of Appeals provides no explanation for this redundancy. Nor does it explain why Congress did not write the exemption similar to the exemptions on the prohibition on manufacture, importation, and sale of armor piercing ammunition, for § 922(a) (7) and (8) allow private manufacture, inter alia, “for the purposes of testing or experimentation authorized by the Secretary.” § 922(o) contains similar “authorized by” lan-

guage without restriction to a specific purpose, such as testing and experimentation.

D. Congress May Enact Two Statutes on the Same Subject, and the Second is not Repealed by Implication

1. *The Existence of Two Statutes on Machineguns is not an Absurd Result*

The Court of Appeals' opinion against the plain meaning of § 922(o) is that it would create two separate statutes on machineguns, and that is an absurd or useless result. App. 6a. Yet numerous instances exist in which similar conduct is punishable under two or more statutes.

Unauthorized possession of a machinegun may be punished under the National Firearms Act or under § 922(o). The National Firearms Act itself allows prosecution of such possession under several subsections, and offenses are punishable for up to ten years imprisonment. 26 U.S.C. §§ 5861(b), (c), and (d), 5871. § 922(o) punishes unauthorized possession of a machinegun with only five years. 18 U.S.C. § 924(a)(1)(D).

The Supreme Court has held that enactment of a prohibition on possession of firearms by felons punishable by two years, does not repeal or render absurd or useless the previous enactment of an identical prohibition punishable by five years. *United States v. Batchelder*, 442 U.S. 114, 120-21 (1979).

Following the plain language of § 922(o) to prohibit possession of machineguns, with an exception for those authorized under the National Firearms Act, is no more of an absurd result than was the existence of the two provisions in *Batchelder*.

2. *How § 922(o) Changes Prior Law*

Linguistically, “under the authority of” includes “authorization” under the National Firearms Act (*e.g.*, 26 U.S.C. § 5841[c]). The Court of Appeals asserts that this nullifies § 922(o), since the provision then would make no change from prior law. It then states that Congress must not be presumed to enact useless or ineffective legislation. (App. 6a.)

The Court of Appeals notes that one must first look to the language of the statute, but at no point does the court do so, and instead remarks:

Although § 922(o) (2) (A)’s possession “under the authority of” a governmental entity exception is arguably ambiguous, the district court’s interpretation of that exception, which essentially preserves existing law, would render § 922(o) (1)’s “machinegun prohibition” a nullity; the Bureau would be required to process applications without regard to § 922(o) (1), and reach the same result as if the prohibition had never been enacted. App. 6a.

The Court does not attempt to explain why the “arguably ambiguous” terms “under the authority of” exclude possession by a person as authorized by the Secretary, and include only possession for sale to or the benefit of a governmental entity. The assertion that plaintiff’s interpretation would render the prohibition “a nullity” is absurd, because § 922(o) (1) radically changed the burden of proof from that under the National Firearms Act.

Specifically, § 922(o) clearly changed existing law by shifting the burden of proof of registration from the prosecution to the defendant. 26 U.S.C. § 5861 makes it unlawful to “possess a firearm [including a machinegun] which is not registered to him in the National Firearms Registration and Transfer Record. . . .”⁴ By contrast,

⁴ The prosecution’s burden to prove lack of registration has been a continuing problem. In hearings which in part later led to passage

18 U.S.C. § 922(o) (1) simply provides that "it shall be unlawful for any person to . . . possess a machinegun." § 922(o) (2) (A) provides an exemption for machineguns possessed under the authority of a department of the United States, meaning that a defendant must prove registration with BATF if the prosecution proves that he possesses a machinegun.

As noted by the District Court, § 922(o) also changes prior law by, *inter alia*, precluding an amnesty for registration of illegal machineguns. App. 21a. § 922(o) did indeed change prior law, but did not repeal the private making and possession of machineguns under the authority of the Treasury Department.

3. Repeal By Implication of the National Firearms Act is Disfavored

The Court of Appeals' interpretation of § 922(o) implies that all provisions of the National Firearms Act ("NFA"), as applied to new machineguns, are repealed by implication. Not only is repeal by implication a disfavored doctrine, but it is incomprehensible that Congress would in this manner abrogate major portions of the NFA.

of the Firearms Owner's Protection Act, BATF documents were introduced stating that "these discrepancies and inaccuracies in the [Registration] Record, if discovered in a trial, would destroy the future credibility of such evidence." Oversight Hearings on the Bureau of Alcohol, Tobacco and Firearms, Senate Appropriations Committee, 96th Cong., 1st Sess., 49 (1979).

United States v. Seven Miscellaneous Firearms, 503 F.Supp. 565, 578 (D.D.C. 1980) noted that "considerable evidence was received that the Bureau's officials have for many years recognized the inadequacy and incompleteness of the Bureau's [registration] records." The court found in regard to an NFA firearm that "the Government has failed to prove that the item is not registered." *Id.* at 576. See *United States v. Allen*, 666 F.Supp. 203, 207-208 (N.D. Ala. 1987) (BATF failed to prove non-registration), *rev'd*, 842 F.2d 1265, 1266 (11th Cir. 1988) (registration certificate held sufficient, citing *United States v. Mayo*, 705 F.2d 62 (2d Cir. 1983)).

In the NFA, the term "firearm" includes a machinegun. 26 U.S.C. § 5845(a)(6). § 5822, which concerns the authorized making of firearms, would be completely repealed as to all new machineguns. The duties of defendant which are supposedly repealed as to machineguns are further prescribed in § 5821 concerning the \$200.00 making tax. The Secretary is required by law to collect all tax receipts. See 31 U.S.C. § 321(a)(6). Further, he is required to provide for the registration of machineguns in § 5841.

The Court of Appeals necessarily assumes that all of the above provisions concerning the making, registration, and taxation of machineguns are repealed by § 922(o),⁵ since its interpretation of § 922(o) renders them useless, although § 922(o) contains no words of repeal. However, "one canon of construction is that repeals by implication are disfavored." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974). See also *Batchelder, supra*, 442 U.S. at 121. Accordingly, § 922(o) should not have been interpreted as repealing the NFA.

II. THE LEGISLATIVE HISTORY IS AMBIGUOUS AND, IN ANY EVENT, DOES NOT SUPPLANT THE STATUTE

The Court of Appeals assumes that ambiguous floor comments (or unspoken comments inserted in the record after debate ended) should override the clear words of the statute. Yet *Garcia v. United States*, 469 U.S. 70, 75 (1984) states that "only the most extraordinary showing of contrary intentions from those data would justify a limitation on the 'plain meaning' of the statutory language."

⁵ These provisions apply to the private making of machineguns. The making of firearms "by, or on behalf of" the United States, a State, or any entities thereof is exempt from the making tax. 26 U.S.C. § 5852(b), 5853(b). At a minimum, therefore, the Court of Appeals necessarily assumes that the making tax is repealed.

As the Court noted, "casual statements from floor debates [are] not always distinguished for candor or accuracy. . . ." *Id.* at 76 n.3. Accordingly, "we have eschewed reliance on the passing comments of one Member . . . and casual statements from the floor debates." *Id.* at 76.

The Court of Appeals relies on colloquies which were never stated orally but simply entered into the record. (App. 7a.) "To permit such colloquies to alter the clear language of the statute undermines the intent of Congress." *Garcia*, 469 U.S. at 78. Given that these colloquies do not even adopt defendant's interpretation of § 922(o), defendant "would lose even if we were to adopt some type of reverse parol evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statutes." *Id.* at 78.

At best, the Court of Appeals' argument is that someone in Congress tried to write § 922(o) a certain way. "The short answer is that Congress did not write the statute that way." *N.C. Dept. of Transp. v. Crest St. Council*, 479 U.S. 6, 14 (1986). As the District Court wisely stated:

It must be kept in mind that the making of laws is a democratic process requiring a majority consensus. Where the Congress has left in place the mechanism whereby some private citizens have on conditions been able to possess automatic weapons, where the plain words assented to by the majority evidence no change in the *status quo ante*, and where the stated purpose of the bill as a whole is to the contrary, courts should not allow floor debate to extend language which was apparently unattainable in the process of drafting and legislative compromise. App. 19a.

Not one hint in the entire seven-year legislative history of the Firearms Owners' Protection Act exists to the effect that registered machineguns were a problem.

Indeed, defendant Higgins repeatedly testified to Congress that no danger exists from registered machineguns possessed by law-abiding citizens. In hearings before the Subcommittee on Crime in 1986, Congressman Bill McCollum asked Mr. Higgins:

Would a ban on the future purchase, sale or transfer, Mr. Higgins, of machineguns reduce machinegun use in crime?

Mr. HIGGINS. I guess, in my experience, it is not the legitimately-held machineguns, those that are registered with us in our hands. I think there are something like 118,000 of those that are registered in our files. Those I can count probably in less than my fingers, the number of cases in which those have been used in a crime or a crime of violence.

So, from our perspective, it is not those legitimately-held guns that are the problem. Legislation to Modify the 1968 Gun Control Act: Hearings Before the House Judiciary Committee, 99th Cong., 1st & 2nd Sess., at 1165 (1987).

Mr. Higgins had previously discussed registered machineguns when he testified that: "Registered machineguns which are involved in crimes are so minimal so as not to be considered a law enforcement problem . . . the number of thefts of registered NFA weapons are minimal and is not considered a law enforcement problem." Armor Piercing Ammunition and the Criminal Misuse and Availability of Machineguns and Silencers, Serial No. 153, Hearings before the Subcommittee on Crime, Judiciary Committee, House of Representatives, 98th Cong., 2d Sess. at 208 (1986).

The legislative history cited by the Court of Appeals is ambiguous at best. App. 7a. Neither Rep. Hughes nor Senator Lautenberg made any attempt to explain the exemption at issue here.

The Court of Appeals seeks to rely on the vague colloquies in the Senate submitted in writing but never

stated orally on the floor. When Senator Hatch asked for consent to place his colloquy with Senate Dole in the *Record*, Senator Metzenbaum stated that "this is a colloquy between two of the proponents, and I do not believe that it should be interpreted as speaking for the rest of us in the Senate since the rest of the Senate has not had a chance to hear it." 132 Cong. Rec., S5359, 5361 (May 6, 1986).

The Dole-Hatch colloquy addresses the "ambiguous language" which creates the § 922(o)(2)(A) exemption. Manufacturers and dealers may transfer machineguns to governmental entities, and may possess, inventory, or stockpile them for such sale. *Id.* at S5360. Thus, even if this unheard colloquy could be relied upon, it sheds no light upon the issue of private possession of registered machineguns since these examples do not exclude the possibility of private possession. Indeed, as stated in the colloquy, "this amendment was designed to deal with crime guns. . . ." *Id.*

Exports are said to be exempt since they "are permitted by the Department of State" and hence are "transfers under the authority of the United States. The United States itself, through a department or agency thereof—the State Department—would be authorizing the transfer." *Id.* While the Court of Appeals quotes this part of the colloquy (App. 8a), it does not explain why the same logic does not apply to the Department of the Treasury—that transfers "permitted" by the department are under its "authority."

The Court of Appeals quotes Senator Hatch's statement that a police officer could no longer keep a machinegun authorized by the state if he left the force. App. 8a. This simply reflects that the gun would be registered to the state agency. Nothing precludes a transfer under the National Firearms Act to the ex-police officer, if the state allows possession of machineguns. (Some states do not.)

The Metzenbaum-Kennedy colloquy, which also was written and not orally stated, was next entered into the *Record*. Sen. Metzenbaum's remark that § 922(o) would ban "any machinegun not *lawfully* possessed on the date of enactment" (*id.* at S5362) appears to preclude an amnesty for registration of machineguns which were illegally possessed on the date of enactment, not to ban future manufacture of legal, registered machineguns. See App. 21a.

Senator Durenberger's comment that the amendment would "ban the future sale and possession of machineguns" (132 Cong. Rec. S5365 [May 6, 1986]) makes sense, even under the Court of Appeals' theory, as applied only to unregistered machineguns. App. 21a. Otherwise, even machineguns made and registered before May 19, 1986, as well as government-owned machineguns, would be banned, which the court clearly does not assert.

In sum, the clear language of the statute governs. While of little assistance, the meager legislative history only confirms that no intent existed to ban newly registered machineguns.

III. AN AGENCY'S INTERPRETATION OF A CRIMINAL STATUTE IS NOT ENTITLED TO DEFERENCE

The Court of Appeals deferred to BATF's interpretation of a criminal statute. Deference is never due an agency in the interpretation of a criminal statute. Moreover, the court ignored the first part of the *Chevron U.S.A.* test, that if the language of the statute is clear, deference is never due.

The regulation at issue is one of several promulgated by BATF after passage of FOPA. Three of those regulations were recognized as invalid in *National Rifle Association v. Brady*, — F.2d — (4th Cir. Sept. 13, 1990) (No. 89-3345), slip op. at 5 n.2, 18-21. One such regulation "impermissibly expands on the requirements of the

statute." *Id.* at 20. The Secretary's argument changing the ordinary meaning of words "stretches the language of the statute 'to the breaking point'" and "place[s] a gloss on the statute which is not supported by the statute's plain language." *Id.* at 20-21. The case at bar is no different.

Crandon v. United States, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990), applied the rule of lenity under a criminal statute to a civil case, and rejected any rule of deference to the administrative agency. The Court held:

Because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of [a statute] is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. *Liparota v. United States*, 471 U.S. 419, 427 . . . (1985); see also *United States v. Bass*, 404 U.S. 336, 347-348 . . . (110 S.Ct. at 1001-02).

The Court concludes its opinion by repeating:

Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of [the statute] remains, it should be resolved in petitioners' favor unless and until Congress plainly states that we have misconstrued its intent. 110 S.Ct. at 1007.⁶

⁶ The Court also rejected the use of legislative history to expand the coverage of a statute. "Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of the statute broader than that clearly warranted by the text." 110 S.Ct. at 1002-03.

The concurring opinion by Justice Scalia explains in more detail:

The vast body of *administrative* interpretation that exists . . . is not an administrative interpretation that is entitled to deference under *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 . . . (1984). . . . We have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference. *Id.* at 1011-12.

It is noteworthy that the Supreme Court in *Crandon*, a civil case, invoked its *Bass* holding that criminal statutes must be construed according to the rule of lenity. Thus, *Crandon* requires the rule of lenity and rejects deference to an agency in interpretation of a criminal statute, even as applied to civil matters.

The Court of Appeals argues that, because Sec. 922(o) may be susceptible of two interpretations, the court must defer to the agency. App. 9a. Yet Congress clearly articulated in plain English in § 922(o)(2)(A) an exemption to the machinegun ban for “possession by or *under the authority of*, the United States or any department or agency thereof”—such as the Bureau of Alcohol, Tobacco and Firearms when it authorizes an individual to possess such firearm pursuant to the National Firearms Act. As was well established in *Chevron U.S.A. v. National Resources Defense Council*, 467 U.S. 837, 842-43 (1984), the deference rule has no place where the statute is clear: “If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

IV. THE COURT OF APPEALS' INTERPRETATION WOULD RENDER BOTH § 922(o) AND THE NATIONAL FIREARMS ACT UNCONSTITUTIONAL

The Court of Appeals' upholding of § 922(o) as a prohibition on private possession of a class of firearms is in direct conflict with *United States v. Bass*, 404 U.S. 336

(1971) and its progeny. The question is of exceptional importance, because the panel's opinion means that Congress is not limited to the powers enumerated in Article I, § 8 of the United States Constitution, but has unlimited power to ban private, intrastate, noncommercial possession of a firearm or any other object, without any finding or even hint of an effect on interstate commerce. Previous firearms regulations were based on Congress' powers to raise revenue⁷ and to regulate interstate commerce.

Such a ban would intrude on an area of exclusive state criminal jurisdiction, and would infringe on the right of the people to keep arms under the Second Amendment. It is unlikely that Congress intended such an interpretation, particularly since defendant Higgins repeatedly testified to Congress that registered machineguns are virtually never misused and are possessed by responsible, law-abiding collectors.

The District Court summarized the constitutional issues, which Court of Appeals does not even address, as follows:

Defendant's proffered interpretation presents the particularly unattractive possibility of constitutional infirmity. The most obvious constitutional challenge to § 922(o) as interpreted by defendant is presented by the second amendment. A particular weapon need only bear some reasonable relationship to the preservation or efficiency of a well regulated militia to fall within the scope of the second amendment. *See Lewis v. United States*, 445 U.S. 55, 65 n. 8 (1979) (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)). . . . Finally, since purely intrastate activity would clearly be affected, defendant's proffered interpretation would subject § 922(o) to substantial constitutional challenges under the commerce clause. (App. 21a.)

The Court of Appeals held "that the Firearms Owners' Protection Act does prohibit the private possession of

⁷ The revenue power is the basis of the National Firearms Act. *Sonzinsky v. United States*, 300 U.S. 506 (1937).

machineguns not lawfully possessed prior to May 19, 1986.” App. 2a. It asserted that statutory interpretation is “the sole issue” in this case. App. 3a. In restricting the issue solely to statutory interpretation, the Court ignored the far more important constitutional issue of the first federal ban on firearms in American history. Plaintiff fully raised this issue in his Complaint and in his briefs before the Court of Appeals, and the failure of the Court of Appeals to address it should not prompt this Court to allow the issue to evade review.

A. If Interpreted to Prohibit Mere Possession With no Nexus With Interstate Commerce, § 922(o) was Beyond the Power of Congress to Enact and is Constitutionally Void

Section 922(o), as interpreted by the Court of Appeals, is not supplemental to the National Firearms Act, a revenue measure, nor is it limited to regulating the transfer or possession of machineguns in interstate or foreign commerce. Yet Congress has no power to prohibit transfer or possession of newly manufactured machineguns, within respective states or in intrastate commerce, but may only regulate them under the revenue and interstate commerce powers delegated by Article I, § 8 of the Constitution.

There are no findings by Congress, and there is nothing in the legislative history from which Congress could have determined, that interstate commerce is burdened or affected by transfer or possession of registered machineguns.⁸

The power of Congress even to ban possession of firearms by felons has been exercised and upheld only because the statutes make an effect on, or nexus with, interstate commerce, an element of the offense. *United States v. Bass*, 404 U.S. 336 (1971) determined: “We do not reach the question whether, *upon appropriate findings*,

⁸ Indeed, as detailed, *supra*, the express congressional findings and the legislative history are directly to the contrary.

Congress can constitutionally punish the 'mere possession' of firearms" *Id.* at 339 n.4 (emphasis added). Still, the Court held: "Because its sanctions are criminal and because, under the Government's broader reading, the statute would mark a major inroad into a domain traditionally left to the States, we refuse to adopt the broad reading in the absence of a clearer direction from Congress." *Id.* at 339.

The basis of the above holding is that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id.* at 349. The Court elaborated as follows:

In the instant case, the broad construction urged by the Government renders traditionally local criminal conduct a matter for federal enforcement and would also involve a substantial extension of federal police resources. Absent proof of some interstate commerce nexus in each case, [18 U.S.C. App.] § 1202(a) dramatically intrudes upon traditional state criminal jurisdiction. . . . The legislative history provides scanty basis for concluding that Congress faced these serious questions and meant to affect the federal-state balance in the way now claimed by the Government. Absent a clearer statement of intention from Congress than is present here, we do not interpret § 1202 (a) to reach the "mere possession" of firearms. *Id.* at 350.

The Court's conclusion left no question about the need to interpret statutes to be consistent with federal jurisdiction: "Consistent with our regard for the sensitive relation between federal and state criminal jurisdiction, our reading preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone." *Id.* at 351.

By contrast, the federal ban on discrimination by places of public accommodations was upheld because "the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate

travel.” *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 253 (1964). In his concurring opinion, Justice Black noted: “‘Commerce’ as used in the Commerce Clause . . . includes not only, as Congress has enumerated in the Act, ‘travel, trade, traffic, commerce, transportation, or communication,’ but also all other unitary transactions and activities that take place in more States than one.”

The Supreme Court has continued to require an interstate-commerce nexus in cases involving firearms. *Scarborough v. United States*, 431 U.S. 563 (1977) held that a felon could be convicted under 18 U.S.C. App. § 1202 (a) (1) where the firearm was shipped in interstate commerce before the felony conviction. The legislative history revealed that the statute’s purpose “was to proscribe mere possession but that there was some concern about the constitutionality of such a statute. . . . However, we see no indication that Congress intended to require any more than the minimal nexus that the firearm has been, at some time, in interstate commerce.” *Id.* at 575.

The Court has continued to follow the *Bass* rule that statutes be construed not to allow federal intrusion into traditional matters of state concern. *Will v. Michigan Dept. of State Police*, 109 S.Ct. 2304, 2308-09, 105 L.Ed.2d 45 (1989); *Bowen v. American Hospital Association*, 476 U.S. 610, 644-45 (1986) (invalidating agency regulations).

Mere possession of firearms with no nexus to interstate commerce is traditionally a matter for state and local criminal law, as *Bass* recognized. The Court has continued to apply *Bass* to other such crimes. *E.g.*, *Williams v. United States*, 458 U.S. 279, 289-90 (1982) (bad checks).

Mere possession of a firearm is neither “interstate” nor “commerce,” nor did anyone in Congress remotely suggest that it affects interstate commerce. Those terms

were explained in *United States v. South-Eastern Underwriters Asso.*, 322 U.S. 533, 550-51 (1944) as follows:

The most widely accepted general description of that part of commerce which is subject to the federal power is that given in 1824 by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. (US) 1, 189, 190, 6 L ed 23, 68, 69. "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches. . . ." Commerce is interstate, he said, when it "concerns more States than one." *Id*, 9 Wheat. (US) 194, 6 L ed 69.

The Court reiterated that commerce "embraces every phase of commercial and business activity and intercourse. . . . Commerce 'comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.'" 322 U.S. at 551 n.34.

In sum, as interpreted by the Court of Appeals, § 922(o) would not be an exercise of the interstate commerce power or any other enumerated power of Congress. Accordingly, that Court should have either rejected defendant's interpretation or declared § 922(o) unconstitutional. This Court should grant a writ of certiorari to protect the integrity of its holdings in *Bass* and its progeny and to prevent assumption by Congress of powers nowhere implied by Article I, § 8 of the Constitution.

B. An Absolute Ban Would Violate The Right Of The People To Keep Arms Under The Second Amendment

The Second Amendment to the U.S. Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." In the Preamble to the Firearms Owners' Protection Act, Congress found that "the rights of citizens . . . to keep and bear arms under the second amendment to the United States Con-

stitution . . . require additional legislation to correct existing firearms statutes. . . ." ⁹ § 1, P.L. 99-308, 100 Stat. 449 (May 19, 1986).

In *United States v. Verdugo-Urquidez*, 108 L.Ed.2d 222, 232-33, 110 S.Ct. 1056, 1060-61 (1990), the Supreme Court made clear that the Second Amendment protects the rights of all law-abiding persons, including plaintiff herein. The Court stated:

*"The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble"). . . . While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. (emphasis added in part.)*¹⁰

⁹ The finding that the Second Amendment guarantees "the rights of citizens" to keep and bear arms was supported by *The Right to Keep and Bear Arms: Report of the Subcommittee on the Constitution*, Senate Judiciary Committee, 97th Cong., 2d Sess. 12 (1982), which states: "The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner."

¹⁰ Concurring, Justice Stevens added that "aliens who are lawfully present in the United States are among those 'people' who are entitled to the protection of the Bill of Rights. . . ." 108 L.Ed.2d at 241. In his dissent, Justice Brennan noted that "the term 'the

In *United States v. Miller*, 307 U.S. 174 (1939), the Court avoided determining whether a short-barrel shotgun may be taxed under the National Firearms Act consistent with the Second Amendment, as no evidence was in the record concerning whether such a shotgun was, or was not, an ordinary militia arm. The Supreme Court remanded the case for fact-finding based on the following:

In the *absence of any evidence* tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, *we cannot say* that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is *not within judicial notice* that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. (Emphasis added). 307 U.S. at 178.

Notably, the *Miller* court did not suggest that the possessor must be a member of the militia or National Guard, asking only whether the arm could have militia use. A machinegun, such as in the case at bar, clearly is ordinary military equipment, and its use could contribute to the common defense. The private, individual character of the right protected by the Second Amendment went unquestioned.

Referring to the militia clause of the Constitution, the Supreme Court stated that "to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made." 307 U.S. at 178. The court noted that "the Militia comprised all males physically capable of acting

people' is better understood as a rhetorical counterpoint 'to the government,' such that rights that were reserved to 'the people' were to protect all those subject to 'the government' . . . 'The people' are 'the governed.'" *Id.* at 247.

in concert for the common defense" and that "these men were expected to appear bearing arms *supplied by themselves* and of the kind in common use at the time." *Id.* at 179 (emphasis added).

Miller also cites approvingly the commentaries of Joseph Story and Thomas M. Cooley. 307 U.S. at 183 n.3. Justice Story stated: "The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of the republic; since it offers a strong moral check against usurpation and arbitrary power of the rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them."¹¹ *Miller's* reference to Judge Cooley finds him stating: "Among the other safeguards to liberty should be mentioned the right of the people to keep and bear arms."¹²

The only "people" this Court has recognized as not entitled to Second Amendment protection are narrow classes such as felons. Of a prohibition on possession in commerce or affecting commerce of a firearm by a felon, the Court held: "*These legislative restrictions* on the use of firearms are neither based upon constitutionally suspect criteria, nor do they trench upon any constitutionally protected liberties." *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (emphasis added).¹³ The Court's

¹¹ 2 J. Story, COMMENTARIES ON THE CONSTITUTION 646 (5th ed. 1891).

¹² T. Cooley, CONSTITUTIONAL LIMITATIONS 729. T. Cooley, GENERAL PRINCIPLES OF CONSTITUTIONAL LAW 281-282 (2d ed. 1891) states further: "The right is General—It may be supposed from the phraseology of this provision that the right to keep and bear arms was only guaranteed to the militia; but this would be an interpretation not warranted by the intent. . . . The meaning of the provision undoubtedly is that the people from whom the militia must be taken shall have the right to keep and bear arms, and they need no permission or regulation of law for the purpose."

¹³ The Court cites *Miller* and three appellate decisions holding that prohibitions on felon possession "do not violate the Second Amendment." *Id.*

summary of the *Miller* rule reiterates primary emphasis on the character of the arm, not membership of its possessor in a formal militia: "the Second Amendment guarantees no right to keep and bear a *firearm* that does not have some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* (emphasis added).

While the Second Amendment protects law-abiding citizens, it does not protect criminals: "This Court has recognized repeatedly that a legislature constitutionally may prohibit a *convicted felon* from engaging in activities far more fundamental than the possession of a firearm."¹⁴ *Id.* at 66 (emphasis added).

Section 922(o), of course, sweeps too broadly. It bans possession by all citizens, not just narrow classes such as felons. At this time of the Bicentennial of the Bill of Rights, this Court should not allow the Court of Appeals to uphold, *sub silentio*, a fundamental infringement on the right of the people to keep arms guaranteed by the Second Amendment.

¹⁴ "Congress focused on the nexus between violent crime and the possession of a firearm by any person with a criminal record. . . . Congress could rationally conclude that any felony conviction, even an allegedly invalid one, is a sufficient basis on which to prohibit the possession of a firearm." *Id.* at 66.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8185

D.C. Docket No. 1:87-cv-440-JOF

J.D. FARMER, JR.,
Plaintiff-Appellee,

versus

STEPHEN E. HIGGINS, Director,
Bureau of Alcohol, Tobacco and Firearms,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(July 11, 1990)

Before HATCHETT and CLARK, Circuit Judges, and
MORGAN, Senior Circuit Judge.

HATCHETT, Circuit Judge:

In this case of first impression, we are asked to determine whether the Gun Control Act of 1968, as amended by the Firearms Owners' Protection Act of 1986, prohibits private persons from possessing machine guns.

We hold that the Firearms Owners' Protection Act does prohibit the private possession of machine guns not lawfully possessed prior to May 19, 1986. We reverse the district court.

FACTS AND PROCEDURAL HISTORY

By application dated October 24, 1986, J. D. Farmer, Jr., the appellee, filed with the Bureau of Alcohol, Tobacco and Firearms (the Bureau) an application to legally make and register a machine gun for his personal collection. 26 U.S.C. §§ 5821, 5822, and 5841 (West 1989). On February 7, 1987, the Bureau disapproved Farmer's application on the ground that the Firearms Owners' Protection Act of 1986 (the Act), "prohibits the making and manufacture of new machineguns for possession by private persons." See Pub. L. No. 99-308, § 102(9), 100 Stat. 449, 452-53 (May 19, 1986), codified at 18 U.S.C.A. § 922(o) (West Supp. 1990).

Subsequently, Farmer filed an action for declaratory judgment and a for writ of mandamus to compel the Bureau to approve his application to make and register a machine gun pursuant to the National Firearms Act. 26 U.S.C. § 5822 (West 1989). On January 6, 1989, the district court ruled that the Act allowed private persons, who comply with the National Firearms Act's application and registration requirements, to make and possess machine guns. The district court denied the petition for a writ of mandamus, however, because the Bureau's approval of an application is a discretionary act.

The district court then allowed Farmer to file an amended complaint alleging that denial of the application was arbitrary, capricious, and an abuse of discretion. On January 2, 1990, the district court reaffirmed its conclusion that the Bureau's interpretation of 18 U.S.C.A. § 922(o) (West Supp. 1990) was unreasonable, and ordered the Bureau to process Farmer's application within

30 days, or issue the requested permit. This court stayed the district court's order pending appeal, and set the case on an expedited schedule.

CONTENTIONS

The Bureau contends that the district court erred when it concluded that the Act's first exemption from the machine gun prohibition, which permits possession of a machine gun "under the authority" of a governmental unit, allows a private person, who complies with the National Firearms Act's application and registration requirements, to manufacture and possess a machine gun. According to the Bureau, its regulations, which prohibit the private possession of machine guns not lawfully possessed prior to May 19, 1986, are consistent with the statutory language, supported by the legislative history, and entitled to deference.

In response, Farmer contends that the district court properly interpreted section 922(o) when it held (1) that the Act does not prohibit the private manufacture and possession of machine guns possessed "under the authority" of the United States, and (2) that the Bureau's implementing regulations are contrary to the plain meaning of section 922(o), and are unreasonable.

ISSUE

The sole issue is whether section 922(o) prohibits the private possession of machine guns not lawfully possessed prior to May 19, 1986.

DISCUSSION

A. Firearms Owners' Protection Act of 1986

18 U.S.C.A. § 922(o) (West Supp. 1990) states:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to—

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

Section 110(c) of the Act provides that the effective date of the “Machinegun Prohibition” is May 19, 1986. Pub. L. No. 99-308, § 110(c), 100 Stat. 449, 461 (May 19, 1986).

After enactment of the Act, the Bureau promulgated implementing regulations proscribing private possession of machine guns, except as provided by the “grandfather” clause found in section 922(o)(2)(B):

(a) *General.* As provided by 26 U.S.C. 5812 and 26 U.S.C. 5822, an application to make or transfer a firearm shall be denied if the making, transfer, receipt, or possession of the firearm would place the maker or transferee in violation of law. Section 922(o), Title 18, U.S.C., makes it unlawful for any person to transfer or possess a machine gun, except a transfer to or buy, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or any lawful transfer or lawful possession of a machine gun that was lawfully possessed before May 19, 1986. Therefore, notwithstanding any other provision of this part, no application to make, transfer, or import a machine gun will be approved except as provided by this section.

(b) *Machine guns lawfully possessed prior to May 19, 1986.* A machine gun possessed in compliance

with the provisions of this part prior to May 19, 1986, may continue to be lawfully possessed by the person to whom the machine gun is registered and may, upon compliance with the provisions of this part, be lawfully transferred to and possessed by the transferee.

27 C.F.R. § 179.105(a), (b) (1989).

Further, the Bureau defined section 922(o)(2)(A)'s exception for transfer or possession "by or under the authority of" the United States, or a state, as follows:

(e) *The making of machine guns on or after May 19, 1986. . . . [a]pplications to make and register machine guns on or after May 19, 1986, for the benefit of a Federal, State or local government entity . . . will be approved if it is established by specific information that the machine gun is particularly suitable for use by Federal, State or local governmental entities and that the making of the weapon is at the request and on behalf of such an entity.*

27 C.F.R. § 179.105(e) (1989).

The district court held that section 922(o) does not prohibit the private possession of machine guns. As the district court interprets section 922(o), the "machine gun prohibition" applies only to an otherwise unauthorized possession of a machine gun (i.e. possession which is not "by or under the authority of" a governmental entity pursuant to section 922(o)(2)(A)). According to this reasoning, if a private person complies with the National Firearms Act's application and registration requirements, then that person may make and register a machine gun.

The Bureau contends that section 922(o) changes prior law by banning, for the first time, the private transfer and possession of machine guns. According to the Bureau, the district court's interpretation of section 922(o) is inconsistent with both the plain language of the Act,

as well as its legislative history. Further, the Bureau argues that the district court improperly set aside its interpretation of section 922(o). The district court reached these erroneous conclusions, the Bureau urges, by construing section 922(o)(2)(A)'s narrow exception to the "machine gun prohibition" so as to swallow the general proscription.

We agree with the Bureau that section 922(o) prohibits the private possession of machine guns not lawfully possessed before May 19, 1986. "In determining the scope of a statute, we look first to its language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). Section 922(o)(1) explicitly provides that, aside from two specified exceptions, "it shall be unlawful for any person to transfer or possess a machine gun." Although section 922(o)(2)(A)'s possession "under the authority of" a governmental entity exception is arguably ambiguous, the district court's interpretation of that exception, which essentially preserves existing law, would render section 922(o)(1)'s "machine gun prohibition" a nullity; the Bureau would be required to process applications without regard to section 922(o)(1), and reach the same result as if the prohibition had never been enacted.

Moreover, if Congress did not intend to change prior law by prohibiting the private possession of machine guns, then section 922(o)(2)(B)'s "grandfather" clause (which exempts from the general prohibition those machine guns lawfully possessed before May 19, 1986) becomes meaningless. "We may not assume Congress to have done a 'useless, ineffective, or absurd thing' [when it enacted legislation]." *U.S. Army Engineer Center v. Federal Labor Relations Authority*, 762 F.2d 409, 417 (4th Cir. 1985) (quoting *Consumers Union of United States, Inc. v. Sawhill*, 512 F.2d 1112, 1118 (Temp. Emer. Ct. App.), *vacated and concurring and dissenting opinion adopted in banc*, 525 F.2d 1068 (Temp. Emer. Ct. App. 1975)); see also *Turkette*, 452 U.S. at 580.

The legislative history of section 922(o) also supports our conclusion that Congress intended to prohibit the private possession of machine guns not lawfully possessed prior to May 19, 1986. On April 10, 1986, Congressman Hughes introduced section 922(o) as a last minute amendment in the House of Representatives. See 132 Cong. Rec. H1750-53 (April 10, 1986). When Congressman Hughes introduced the amendment, he requested "an opportunity to explain why machineguns should be banned," observing that "I do not know why anyone would object to the banning of machineguns." 132 Cong. Rec. H1750 (April 10, 1986) (statement of Rep. Hughes).

In the subsequent Senate floor debate on May 6, 1986, various Senators addressed the machine gun amendment adopted by the House. Senator Metzenbaum explained that the intent of the amendment is to ban the possession of machine guns, except as provided by the "grandfather" clause:

[T]he House version, which we are about to vote on here, has a very important improvement from the bill the Senate adopted last July, and that is to *ban the transfer, possession of any machinegun not lawfully possessed on the date of enactment.*

132 Cong. Rec. 9602 (1986) (statement of Sen. Metzenbaum) (emphasis added). Similarly, Senator Lautenberg expressed approval of the improvements added by the House noting that the bill "bars future sales and possession of machineguns by *private* citizens." 132 Cong. Rec. 9605 (1986) (statement of Sen. Lautenberg (emphasis added)).

Senators Dole and Hatch discussed the scope of the "somewhat ambiguous" first exception to the prohibition covering machine guns transferred or possessed "under the authority of, the United States . . . or a State." 132 Cong. Rec. 9600 (statement of Sen. Dole). Senator Hatch explained:

In the case of the military, the manufacturer would be transferring to the United States or a department . . . the machinegun would be possessed by the United States, and these sales and other transactions would clearly take place *under the authority of the United States*. . . . Any local police would be specifically covered by the language in this provision permitting the transactions and possession to or by or *under the authority of a subdivision of a State*.

132 Cong. Rec. 9600 (1986) (statement of Sen. Hatch) (emphasis added).

Senator Dole subsequently asked Senator Hatch how the provision would affect the sale of weapons to foreign State:

allies or other exports permitted by the Department of

MR. HATCH: Once again, these should be considered transfers under the authority of the United States. The United States itself . . . would be authorizing this transfer

132 Cong. Rec. 9600 (1986) (statement of Sen. Hatch).

Senators Dole and Hatch further discussed whether the "under the authority of" language would allow a local police force to authorize its officers to purchase machine guns to be owned by the officer rather than the police. 132 Cong. Rec. 9601 (statement of Sen. Dole). Senator Hatch responded that:

possession or transfer of those weapons would cease to enjoy the authorization of the State agency or subdivision when the officer was no longer on the police force. The police force would then have to exercise its authority to guarantee that the machinegun was transferred to another entity authorized by the State or the United States to possess such weaponry.

132 Cong. Rec. 9601 (statement of Sen. Hatch) (emphasis added). Senator Durenberger thereafter thanked Senators Dole and Hatch for clarifying "a very important issue surrounding the amendment to ban the future sale and possession of machineguns." 132 Cong. Rec. 9605 (1986) (statement of Sen. Durenberger).

These statements are irreconcilable with Farmer's reading of section 922(o) because they reveal clearly (1) that Congress intended to change the law to prospectively preclude the private possession of machine guns, and (2) that Congress intended to limit lawful transfer and possession of machine guns to instances authorized by the government for the benefit of federal, state, or local governmental entities. Consequently, in light of the plain language of section 922(o), as well as its legislative history, we hold that section 922(o) prohibits the private possession of machine guns not lawfully possessed prior to May 19, 1986.

Further, we defer to the Bureau's interpretation of section 922(o), embodied in its implementing regulations at 27 C.F.R. § 179.105 (1989), because it is consistent with the statutory language and Congressional intent. See *Gun South, Inc. v. Brady*, 877 F.2d 858, 864 (11th Cir. 1989) ("[w]e must defer to the Bureau's interpretation of the Gun Control Act and its regulations absent plain error in the Bureau's interpretation"); *Veterans Administration Medical Center v. Federal Labor Relations Authority*, 675 F.2d 260, 262 (11th Cir. 1982) (agency interpretation should be followed absent compelling indications that it is wrong).

We have considered Farmer's remaining arguments and find them to be without merit.

CONCLUSION

In sum, we hold that section 922(o) prohibits the private possession of machine guns not lawfully possessed before May 19, 1986. Accordingly, the district court's order is reversed.

REVERSED

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8185

J.D. FARMER, JR.,
Plaintiff-Appellee,
versus

STEPHEN E. HIGGINS, Director,
Bureau of Alcohol, Tobacco and Firearms,
Defendant-Appellant.

On Appeal from the United States District Court
— for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion July 11, 11th Cir., 1990, — F.2d —)
(Aug. 30, 1990)

Before: HATCHETT and CLARK, Circuit Judges, and
MORGAN, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:87-CV-0440-JOF

J. D. FARMER, JR.,

Plaintiff,

vs.

STEPHEN E. HIGGINS, Director,
Bureau of Alcohol, Tobacco and Firearms,
Defendant.

ORDER

[Filed Jan. 6, 1989]

This matter is before the court on defendant's motion to dismiss.

I. INTRODUCTION

Plaintiff's complaint, seeking mandamus and declaratory relief, was filed March 9, 1987. By this action, plaintiff seeks an order compelling¹ defendant to approve his "Application to Make and Register a Firearm" submitted pursuant to the National Firearms Act (Count One), or in the alternative, declaring² a recently amended portion

¹ "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

² "In the case of an actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a).

of the Federal Gun Control Act of 1968 unconstitutional (Counts Two through Four). Defendant seeks dismissal of plaintiff's complaint for failure to state a claim upon which relief can be granted.

II. STATEMENT OF FACTS

The parties to this action are plaintiff J. D. Farmer, a citizen of the State of Georgia; and Stephen E. Higgins, the Director of the Federal Bureau of Alcohol, Tobacco and Firearms (BATF), a division of the United States Department of Treasury. On November 24, 1986, plaintiff filed with BATF an "Application to Make and Register a Firearm" for the purpose of obtaining a machine gun. Complaint, Exhibit A. This application indicated that plaintiff was seeking such approval in his individual capacity and for his own personal collection. *Id.* By notice dated February 7, 1987, however, plaintiff's application was disapproved by BATF. *Id.*, Exhibit B. Plaintiff was thereby informed that rejection of his application was mandated by the recently enacted amendments to the Gun Control Act of 1968 found within the federal Firearms Owners' Protection Act of 1986. *Id.* This action followed.

III. DISCUSSION

A. *Applicable Legislation.*

1. The Gun Control Act of 1968.

The manufacture, possession and transfer of firearms in general and machine guns in particular are governed by the provisions of the Gun Control Act of 1968 (GCA), 18 USC § 921, *et seq.*, and the National Firearms Act (NFA), 26 USC § 1501, *et seq.* The GCA, which has been made a part of the criminal code, was enacted to restrict public access to firearms by making illegal certain transfers as well as the possession of firearms by

certain individuals. See *Barrett v. United States*, 423 U.S. 212 (1976); *Huddleston v. United States*, 415 U.S. 814 (1974). Reacting to what it perceived as deficiencies in the GCA, Congress subsequently enacted the Federal Firearms Owners' Protection Act of 1986, P.L. 99-308, reprinted in No. 5 U.S. Code Cong. & Ad. News, 100 Stat. 449 (1986). This act, passed May 19, 1986 and made effective 180 days thereafter,³ was enacted "to strengthen the Gun Control Act of 1968 to enhance the ability of law enforcement to fight violent crime and narcotics trafficking" H.R. 99-495, 99th Cong. 2d Sess. (1986), reprinted in No. 4 U.S. Code Cong. & Ad. News at 1327. Senator Dole described the role of the 1986 Act as follows:

The Firearms Owners' Protection Act would correct various abuses which have occurred under the Gun Control Act of 1968. The 1968 law was passed during an emotional period, when the nation was reacting to two political assassinations. The national judgment at that time was to take away rights enjoyed by many in order to prevent a recurrence of the outrageous abuses of a few. Each year's experience under the law brought with it new evidence that Congress had gone too far. Hunters, sportsmen, hobbyists, and collectors were being prosecuted for technical violations, diverting limited law enforcement resources from the pursuit of those guilty of truly criminal firearms use. [The 1986 Act] is the culmination of seven years of painstaking debate and analysis over the deficiencies in the 1968 law and how they can be best corrected. I believe the legislation represents a good faith effort to balance the rights of law abiding gun owners with the needs of law enforcement.

132 Cong. Rec. S. 5358 (May 6, 1986).

³ The portion of the 1986 Act challenged here; i.e., the so-called "machine gun prohibition," itself became effective immediately upon passage of the act. See *id.*, 100 Stat. at 461.

Though it did not repeal the GCA, the 1986 Act effected substantial amendments to key portions of the GCA. Relevant to the instant action is a 1986 amendment to section 922 of the GCA, entitled "Unlawful Acts." This 1986 amendment provides,

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun [sic].

(2) This subsection does not apply with respect to—

(A) A transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) Any lawful transfer or lawful possession of a machinegun [sic] that was lawfully possessed before the date the subsection takes effect.

18 USC § 922(o) (the "machine gun prohibition").⁴ Thus, a person otherwise entitled to possess or transfer a firearm cannot legally transfer or obtain possession of a machine gun unless (1) such is accomplished under federal or state authority or (2) the machine gun in question was in existence and lawfully possessed before May 19, 1986.

2. The National Firearms Act.

As noted above, the manufacture, transfer and possession of machine guns are likewise governed to a certain extent by the provisions of the National Firearms Act (NFA), 26 USC § 5801, *et seq.* Unlike the GCA, which is a criminal act, the NFA is a part of the Internal Revenue Code. Nevertheless, the NFA was enacted, at least in

⁴ Willful violations of section 922(o) are punishable by fine of up to \$5,000 and/or imprisonment for up to five years. 18 USC § 924(a)(1)(D).

part, to strengthen the firearms provisions of existing law. 1968 U.S. Code Cong. & Ad. News, p. 4412. To this end, the NFA mandates that the Secretary of the Treasury⁵ deny all applications to transfer or make a firearm if the granting of such an application would place the transferee or maker in violation of law. 26 USC §§ 5812, 5822. Pursuant to this mandate and because defendant determined that plaintiff did not fall within the "federal or state authority" exception to the GCA's machine gun prohibition,⁶ defendant disapproved plaintiff's application. It is plaintiff's position that defendant has misapplied the applicable law; i.e., section 922(o) of the GCA, and thus should be compelled to approve plaintiff's application. In particular, plaintiff argues that approval of his application by defendant would necessarily place him within the "federal or state authority" exception, thereby making disapproval under the NFA unwarranted.⁷ In the alternative, plaintiff contends that section 922(o) is violative of the second, fifth and tenth amendments and exceeds Congress' power under the commerce clause.

B. *Count I (Mandamus).*

In its original sense, mandamus is a judicial remedy to compel the performance of a public official's non-discretionary ministerial duty. *Stern v. South Chester Tube Co.*, 390 U.S. 606, — (1968). Thus, mandamus will not lie where the duty sought to be compelled is discretionary. *Id.* A particular duty is considered to be ministerial and thus subject to mandamus when it "is in a particular

⁵ The Secretary's duties and obligations under the NFA have been delegated to defendant. See 37 Fed. Reg. 11696.

⁶ It is undisputed that the GCA's second exception concerning pre-May 19, 1986 machine guns is inapplicable in this case.

⁷ "If the application is approved . . . plaintiff will make and possess the machine gun 'under the authority of' the Federal Bureau of Alcohol, Tobacco and Firearms as well as the State of Georgia." Plaintiff's Response at 2 (citing O.C.G.A. § 16-11-124).

situation so plainly prescribed as to be free from doubt and equivalent to a positive command." *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). On the other hand, "when the duty is not thus plainly prescribed, but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion that cannot be controlled by mandamus." *Id.* The analysis is three part: For plaintiff to succeed on this aspect of his complaint, he must demonstrate (1) that he has a clear right to the relief sought; (2) that defendant has a plainly defined⁸ and non-discretionary duty to honor that right; and (3) that no other adequate remedy, judicial or administrative, is available.⁹ *Heckler v. Ringer*, 466 U.S. 602, — (1984).

1. Clear right to relief sought.

The resolution of this issue necessitates an analysis of section 922(o). The primary obligations of the courts in such instances is to ascertain and declare the intention of the legislature and to carry such intention into effect. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). In so doing, the courts should look first to the language of the statute itself, as it is the "most persuasive evidence of congressional intent." *United States v. American Trucking Associations*, 310 U.S. 534, 542 (1939). *North Dakota v. United States*, — U.S. —, 103 S. Ct. 1095, 1103-03 (1983). Moreover, in reviewing statutory language, the courts must proceed under the assumption that Congress

⁸ A public officer's erroneous interpretation of the meaning of the statute in question will not protect him from a writ of mandamus compelling him to perform his duty according to the true meaning of the statute, however. *Roberts v. United States*, 176 U.S. 221, 231 (19—).

⁹ Because plaintiff plainly has no other adequate remedy available to him, his entitlement to mandamus relief turns on whether the first two prerequisites have been established.

used the words of a given statute as they are commonly and ordinarily understood. *United States v. Stewart*, 311 U.S. 60, 63 (1940); *United States v. Affelbaum*, 445 U.S. 115, 121 (1980); *Perrin v. United States*, 444 U.S. 37, 42 (1980). And, absent a *clearly expressed* legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Consumer Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Turning to the statutory language at issue here, it is not arguable that section 922(o) may be read as intending only one of two conflicting exemptions to the machine gun ban: (1) only machine guns possessed by or for the benefit of governmental entities in connection with official government duties; or (2) all machine guns possessed pursuant to NFA licenses issued by defendant. The court believes, however, that the plain reading of the statute favors the latter exemption and that this interpretation controls. *Id.*

One observer has noted, "[I]t is hard to say that a person who receives or transfers a firearm after 'the Secretary [of the Treasury]¹⁰ has approved the transfer¹¹ does not possess and transfer 'under authority of the United States, a department or agency thereof.'" Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 Cumb. L. Rev. 585, 675 (1987). Apart from the common and ordinary meaning attached to the phrase "under authority of," plaintiff points to other provisions of the GCA wherein the phrase is used in the same context. *See, e.g.*, 18 U.S.C. §§ 922(a)(4), (a)(7), (a)(8), (b)(4); 925(d); *see also* 27 C.F.R. §§ 178.22(a)(3), (b); 179.26(a)(3), (b). So, prior to the enactment of the new statute, any licensed private citizen to whom a machine gun was transferred possessed it under the authority of the United States. Government

¹⁰ See footnote six, *supra*.

¹¹ 26 U.S.C. § 5812 (1982).

officials now, however, would give those words in the new statute a changed meaning and would contend under the newfound meaning that though the BATF is still empowered by the Congress to grant authority to transfer or possess machine guns, it may not do so because the applicant does not already have a license from it.

This curious position is made possible because the United States apparently feels free to give words and procedures of established meaning a new interpretation so that now "under authority of the United States" really refers only to automatic weapons possessed or transferred for official use. It is contended that this interpretation may be gleaned from the legislative history of the new law, and, to be sure, there are speeches by so members of Congress which support this interpretation. It must be kept in mind that the making of laws is a democratic process requiring a majority consensus. Where the Congress has left in place the mechanism whereby some private citizens have on conditions been able to possess automatic weapons, where the plain words assented to by the majority evidence no change in the *status quo ante*, and where the stated purpose of the bill as a whole is to the contrary, courts should not allow floor debate to extend language which was apparently unattainable in the process of drafting and legislative compromise. In light of the strong presumption afforded Congress' choice of words in giving effect to its intent, the court concludes plaintiff has established that section 922(o) creates in him a right to the relief sought. This conclusion is supported by the Firearms Owners' Protection Act ¹² itself:

The Congress finds that . . . the rights of citizens [under the second, fourth, fifth, ninth and tenth amendments to the United States Constitution] require additional legislation to . . . reaffirm the in-

¹² As noted previously, section 922(o) is part of the Firearms Owners' Protection Act.

tent of the Congress . . . that it is not the purpose of this title to place any undue or unnecessary federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.

Pub.L. 99-308 section 1(b), reprinted in No. 5 U.S. Code Cong. & Ad. News, 100 Stat. 449 (1986). Defendant's proffered interpretation is inconsistent with this clear statement of legislative intent.

The court's conclusion is likewise supported by the inherent flaws to be found in the alternative interpretation advanced by defendant. First, such an exemption existed prior to 1986. Section 925(a)(1) of the GCA provides,

The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any state or any department, agency, or political subdivision thereof.

Thus, defendant's interpretation of section 922(o) carries with it the implicit conclusion that Congress either overlooked the existence of the previous exemption or purposefully enacted a redundant provision without reference to the earlier and through significantly different statutory language. The presence of either of these possibilities lends strong support to the accuracy of plaintiff's interpretation.

Second, defendant's proffered interpretation presents the particularly unattractive possibility of constitutional

infirmity.¹³ The most obvious constitutional challenge to section 922(o) as interpreted by defendant is presented by the second amendment. A particular weapon need only bear some reasonable relationship to the preservation or efficiency of a well regulated militia to fall within the scope of the second amendment. See *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1979) (citing *United States v. Miller*, 307 U.S. 174, 178 (1938)). As noted by plaintiff, "Machineguns [sic] manufactured and registered after May 19, 1968 are part of the ordinary military equipment; their use could contribute to the common defense; and lawful transfer and possession thereof have a reasonable relationship to the preservation or efficiency of a well-regulated militia." Complaint, ¶ 26. Similarly, the fifth amendment protection against self-incrimination might be implicated by federal prosecutions for failure to register newly made machine guns. Finally, since purely intra-state activity would clearly be affected, defendant's proffered interpretation would subject 922(o) to substantial constitutional challenges under the commerce clause. Plaintiff's proffered interpretation avoids potential constitutional problems and is thus favored. *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979).

While plaintiff's proffered interpretation of section 922(o) is not without flaws of its own,¹⁴ it is clearly the

¹³ Indeed, this proposition forms the basis of plaintiff's alternative claim as expressed in Counts Two through Four of this complaint.

¹⁴ As defendant points out, plaintiff's interpretation of section 922(o) carries with it the possibility that the 1968 amendments did not change prior law. Hardy offers one solution:

[T]here remains the possibility that the amendment will bar future exercise of the amnesty power given the Secretary [of the Treasury] by the GCA. Under this provision, the Secretary retained continuing and broad authority to call an amnesty for registration of presently illegal machineguns [sic]. The subject of these powers had earlier been raised on the Senate side, where the majority leader had suggested their expansion,

proper choice between the two. Accordingly, the court concludes that plaintiff has demonstrated that section 922(o) does not preclude relief. The court therefore turns its attention to the question of whether plaintiff has met his burden of demonstrating that defendant's duties in connection with this clear right are ministerial rather than discretionary.

2. Ministerial or discretionary duty.

Plaintiff's application was denied pursuant to section 5822 of the NFA which provides,

No person shall make a firearm unless he has (a) filed with the Secretary [of the Treasury] a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form; (c) identified the firearm to be made in the application may by regulations prescribe; (d) identified himself in the application form in such manner as the Secretary may by regulations prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtained the approval of the Secretary to make and

and the enforcing agency had strongly opposed the suggestion. That ruling out such an amnesty was meant to be an effect of the amendment is suggested by a Senate colloquy specifically singling out that effect.

Hardy, 17 *Cumb. L. Rev.* at 675-76 (citing 132 *Cong. Rec. S.* 5362 (Daily Ed. May 6, 1986)). Plaintiff offers others: (1) Section 922(o)(2)(B) provides a more restrictive definition of "machine gun" than did existing law; (2) violations of section 922(o)(1) are punishable by five years imprisonment as opposed to the ten-year maximum established for violations of existing law, thereby providing increased flexibility in plea bargaining; and (3) as opposed to existing law, violations of section 922(o) must be "willful." See August 17, 1987 Response at 30-33.

register the firearm and the application form show such approval. Application shall be denied if the making or possession of the firearm would place the person making the firearm in violation of law.

Plaintiff reads section 5822 as requiring defendant to approve an application if such would not place the applicant in violation of law. The court rejects this interpretation. First, there is no language within section 5822 which can be fairly said to be "equivalent to a positive command."¹⁵ *Wilbur*, 281 U.S. at 218. Indeed, as noted by defendant, "The remainder of the statute imposes mandatory duties upon the *applicant*." Reply at 4. Moreover, subsection (e) of section 5822 makes reference to "the approval of the Secretary to make and register the firearm." Significantly, the other requirements imposed on applicants by section 5822 are not made prerequisites to approval; rather, they *together with* approval of the Secretary are made prerequisites to the legal making of a firearm. This fact strongly suggests that the approval of an application by the Secretary is a discretionary act.¹⁶

Reference must also be made to the regulations promulgated by BATF under authority of section 5822.¹⁷ In this regard, 27 C.F.R. § 179.64 provides,

¹⁵ With the exception of the requirement that applications be denied which otherwise would place the applicant in violation of law.

¹⁶ Compare section 5822 with section 923 of the GCA which governs licenses to import, manufacture or deal firearms. Subsection (c) of that statute provides, "Upon the filing of a proper application and payment of the prescribed fee, the Secretary *shall issue to a qualified applicant the appropriate license . . .*" The duty imposed on defendant by section 923(c) is so clearly prescribed that the statute's own legislative history provides specifically that mandamus relief is available. See H.R. Rep. No. 1577, 90th Cong. 2d Sess. 16, reprinted in 1968 U.S. Code Cong. & Ad. News 4410, 4422.

¹⁷ The court is obliged to afford due deference to the interpretation offered by the agency whose duty it is to implement and ad-

The application to make a firearm . . . must be forwarded directly, in duplicate, by the maker of the firearm to the director [of BATF] in accordance with the instructions on the form. The director will consider the application for approval or disapproval.

While this regulation imposes a clear duty on defendant to consider an application for approval, this is far removed from a requirement that an application otherwise meeting the requirements of section 5822 be approved.¹⁸ In any event, the word "consider" as it appears within section 179.64 connotes discretion.

Finally, while the court has located no cases construing the nature of defendant's authority under section 5822, cases addressing other aspects of BATF's authority demonstrate that Congress has bestowed a substantial amount of discretion upon BATF under both the GCA and NFA. See, e.g., *National Coalition to Ban Handguns v. Bureau of Alcohol, Tobacco and Firearms*, 715 F.2d 632, 633 (D.C.Cir. 1983) (BATF's exercise of authority under section 923 of GCA is agency action committed to agency discretion by law); *Kitchens v. Department of Treasury*, 535 F.2d 1197, 1199 (9th Cir. 1976) (BATF has discretionary authority to grant or deny leave from import bans); *Davis v. Erdmann*, 607 F.2d 917, 919 (10th Cir. 1979) (BATF has discretionary authority to grant or deny relief from firearms disabilities under section 925 of GCA); see also *Young v. Bureau of Alcohol, Tobacco and Firearms*, 690 F. Supp. 990, 994 (S.D.Ala. 1988); *Thompson v. Department of the Treasury*, 533 F. Supp. 90, 92 (D.Utah 1981). There exists no reason why this broad grant of discretion should not be construed as encompassing defendant's responsibilities under section 5822

minister the statute in question. *National Labor Relations Board v. Hearst Publications, Inc.*, 322 U.S. 111 at 130-31 (1944).

¹⁸ Moreover, as noted by defendant, "It is undisputed that BATF has discharged its duty [of considering plaintiff's application] here." Reply at 4.

as well. Thus, for the reasons set forth above, the court concludes that plaintiff has failed to demonstrate that defendant's duties under section 5822 are merely ministerial and therefore has failed to establish an essential element of his claim for mandamus relief. Accordingly, this aspect of defendant's motion to dismiss must be GRANTED.

C. *Counts II-IV.*

In light of the court's interpretation of section 922(o), plaintiff's alternative position; i.e., that the statute is unconstitutional, is now moot. Accordingly, this aspect of defendant's motion to dismiss is GRANTED as well.

III. CONCLUSION

In sum, defendant's motion to dismiss is GRANTED. This action is hereby TERMINATED.

IT IS SO ORDERED, this 5th day of January, 1989.

/s/ J. Owen Forrester
J. OWEN FORRESTER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 1:87-CV-0440-JOF

J. D. FARMER, JR.,

Plaintiff,

vs.

STEPHEN E. HIGGINS, Director,
Bureau of Alcohol, Tobacco and Firearms,
Defendant.

ORDER

[Filed Dec. 15, 1989]

This matter is before the court on the parties' cross motions for summary judgment on count five of plaintiff's amended complaint. *See* Fed. R. Civ. P. 56.

I. STATEMENT OF FACTS

The parties to this action are plaintiff J. D. Farmer, Jr., a citizen of the state of Georgia; and Stephen E. Higgins, the Director of the Federal Bureau of Alcohol, Tobacco and Firearms (hereinafter "BATF"), a division of the United States Department of Treasury. On October 24, 1986, plaintiff filed an application with BATF for permission to make and register a machine gun for his own personal use. By letter dated February 7, 1987, however, plaintiff's application was denied by BATF. The letter informed plaintiff that rejection of his application was mandated by the recently-enacted amendments to the Gun Control Act of 1968 found within the Federal Firearms Owners Protection Act of 1986.

On March 9, 1987, plaintiff brought suit in this court seeking mandamus and declaratory relief. By order of January 6, 1989, this court dismissed plaintiff's claims attacking the constitutionality of the Gun Control Act and denied plaintiff's motion for mandamus relief.

By order dated June 23, 1989, this court granted plaintiff leave to amend his complaint to add a claim alleging that BATF's denial of his machine gun application was arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act (hereinafter "APA"). Both parties now move for summary judgment on count five of plaintiff's amended complaint.

II. CONCLUSIONS OF LAW

A *Summary Judgment Standard.*

Summary judgment is not properly viewed as a device which a trial court in its discretion may or may not implement in lieu of a trial on the merits. To the contrary, Fed. R. Civ. P. 56 *mandates* the entry of summary judgment against a party who fails to make a showing sufficient to establish the existence of *every* element essential to the party's case, and on which that party will bear the burden of proof at trial.¹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Brown City of Clewis-ton*, 848 F.2d 1534, 1537 (11th Cir. 1988). The movant bears the "initial responsibility" of asserting the basis of his motion. *See Celotex Corp.*, 477 U.S. at 323; *Livernois*, 837 F.2d at 1022. The movant is not required to negate his opponent's claim, however. *See Celotex Corp.*, 477 U.S. at 322. Rather, the movant may discharge his burden by merely "showing—that is, pointing out to the

¹ In such a situation, there can be no "genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Livernois v. Medical Disposables, Inc.*, 837 F.2d 1018, 1022 (11th Cir. 1988).

district court—that there is an absence of evidence to support the non-moving party's case.” *Id.* at 325.

After the movant has carried his burden, the non-moving party is then required “to go beyond the pleadings” and present competent evidence designating “specific facts showing that there is a genuine issue for trial.” *Id.* at 324. While this evidence need not be in a form that would be admissible at trial,² *id.*, “it must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Electronic Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 581 (1986); *Samples v. City of Atlanta*, 846 F.2d 1328, 1331 (11th Cir. 1988). Similarly, though the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, *see Samples v. City of Atlanta*, 846 F.2d at 1331, “the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there is no genuine issue of material fact.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original); *Brown*, 848 F.2d at 1537. An issue is not genuine if it is unsupported by evidence, or if it is created by evidence that is “merely colorable” or is “not significantly probative.” *Anderson*, 477 U.S. at 250. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the non-moving party's case. *Id.* at 248. Thus, to survive a motion for summary judgment, the non-moving party must come forward with specific evidence of *every* element material to his case so as to create a genuine issue for trial. *See Celotex*, 477 U.S. at 323; *Brown*, 848 F.2d at 1537.

² That is, the non-moving party may meet its burden through affidavit and deposition testimony, answers to interrogatories, and the like. *See Ross v. Bank South*, 837 F.2d 980, 984 (11th Cir. 1988). General competency rules are still applicable, however. *See United States v. Dairyland Ins. Co.*, 644 F. Supp. 702, 708 (N.D.Ga. 1986) (Hall, J.).

B. *Applicable Legislation.*

1. The Gun Control Act of 1968.

The manufacture, possession and transfer of firearms in general and machine guns in particular are governed by the provisions of the Gun Control Act of 1968 (hereinafter "GCA"), 18 USC § 921, *et seq.*, and the National Firearms Act (hereinafter "NFA"), 26 USC § 1501, *et seq.* The GCA, which has been made part of the criminal code, was enacted to restrict public access to firearms by making illegal certain transfers as well as the possession of firearms by certain individuals. See *Barrett v. United States*, 423 U.S. 212 (1976); *Huddleston v. United States*, 415 U.S. 814 (1974). Reacting to what is perceived as deficiencies in the GCA, Congress subsequently enacted the Federal Firearms Owners Protection Act of 1986, P.L. 99-308, reprinted in No. 5 U.S. Code Cong. & Ad. News, 100 Stat. 449 (1986). This Act, passed May 19, 1986 and made effective 180 days thereafter,³ was enacted "to strengthen the Gun Control Act of 1968 to enhance the ability of law enforcement to fight violent crime and narcotics trafficking. . . ." H.R. 99-495, 99th Cong. 2d Sess. (1986), reprinted in No. 4 U.S. Code Cong. & Ad. News at 1327. Senator Dole described the role of the 1986 Act as follows:

The Firearms Owners Protection Act would correct various abuses which have occurred under the Gun Control Act of 1968. The 1968 law was passed during an emotional period, when the nation was reacting to two political assassinations. The national judgment at that time was to take away rights enjoyed by many in order to prevent a reoccurrence of the outrageous abuses of a few. Each year's experience under the law brought with it new evidence

³ The portion of the 1986 Act challenged here; i.e., the so-called "machine gun prohibition," itself became effective immediately upon passage of the Act. See *id.*, 100 Stat. at 461.

that Congress had gone too far. Hunters, sportsmen, hobbyists, and collectors were being prosecuted for technical violations, diverting limited law enforcement resources from the pursuit of those guilty of truly criminal firearms use. [The 1968 Act] is the culmination of seven years of painstaking debate and analysis over the deficiencies in the 1968 law and how they can be best corrected. I believe the legislation represents a good faith effort to balance the rights of law-abiding gun owners with the needs of law enforcement.

132 Cong. Rec. S. 5358 (May 6, 1986).

Though it did not repeal the GCA, the 1986 Act effected substantial amendments to key portions of the GCA. Relevant to the instant action is a 1986 amendment to section 922 of the GCA, entitled "Unlawful Acts." This 1986 amendment provides,

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun [sic]

(2) This subsection does not apply with respect to—

(a) A transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a state, or a department, agency, or political subdivision thereof; or

(b) any lawful transfer or lawful possession of a machinegun [sic] that was lawfully possessed before the date the subsection takes effect.

18 USC § 1922(o) (hereinafter "machine gun prohibition").⁴ Thus, a person otherwise entitled to possess or

⁴ Willful violations of § 922(o) are punishable by fine of up to \$5,000 and/or imprisonment for up to five years. 18 USC § 924(a)(1)(D).

transfer a firearm cannot legally transfer or obtain possession of a machine gun unless (1) such is accomplished under federal or state authority or (2) the machine gun in question was in existence and lawfully possessed before May 19, 1986.

2. The National Firearms Act.

As noted above, the manufacture, transfer and possession of machine guns are likewise governed to a certain extent by the provisions of the National Firearms Act. Unlike GCA, which is a criminal act, the NFA is a part of the Internal Revenue Code. Nevertheless, the NFA was enacted, at least in part, to strengthen the firearms provision of existing law. *See* 1968 U.S. Code Cong. & Ad. News, p. 4412. To this end, the NFA mandates that the Secretary of the Treasury⁵ deny all applications to transfer or make a firearm if the granting of such an application would place the transferee or maker in violation of law. 26 USC §§ 5812, 5822. Pursuant to this mandate and because defendant determined that plaintiff did not fall within the "federal or state authority" exception to GCA's machine gun prohibition,⁶ defendant disapproved plaintiff's application. It is plaintiff's position that defendant has misapplied the applicable law; i.e., § 922(o) of the GCA, and thus should be compelled to approve plaintiff's application. In particular, in count five of his amended complaint, plaintiff asks this court to find BATF's disapproval of his application to be "arbitrary, capricious, an abuse of discretion, in excess of statutory authority, and otherwise not in accordance with law." Plaintiff's Amended Complaint, ¶ 29. Plaintiff argues that no legal basis exists for denial of an application under § 922(o) where a private citizen satisfies all of the legal registration requirements.

⁵ The Secretary's duties and obligations under the NFA have been delegated to defendant. *See* 37 Fed. Reg. 11696.

⁶ It is undisputed that the GCA's second exception concerning pre-May 19, 1986 machine guns is inapplicable in this case.

C. *Count Five—Abuse of Discretion.*

Congress has delegated the administration of the Gun Control Act of 1968 and the National Firearms Act to the Department of Treasury of the United States, which acts through the Bureau of Alcohol, Tobacco and Firearms. The scope of this court's review of BATF decisions is a narrow one. As is true of the review of other types of agency action, decisions of the BATF may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 5 USC § 706(2)(A) (1976); *Florida Nat. Guard v. Federal Labor Rel. Auth.*, 699 F.2d 1082, 1084 (11th Cir. 1983). Under the "arbitrary and capricious" standard, a reviewing court must conduct a searching and careful review of the facts to determine if the agency decision is based on a consideration of all relevant facts and is not a clear error in judgment. *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

In so doing, this court must apply the usual *Chevron* standard with respect to the BATF's construction of its firearms act, that is, "considerable weight should be accorded to an [agency's] construction of a statutory scheme it is entrusted to administer," and this court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). If, therefore, the statute lends itself to more than one interpretation, this court must accept that of the BATF if it is reasonable. According deference to an agency, however, does not imply "rubber stamping" its decision. *See Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Rel. Auth.*, 464 U.S. 89, 97 (1983).

The resolution of this issue necessitates an analysis of § 922(o). It is undisputed that BATF disapproved plaintiff's application, without review, solely on the basis

of its interpretation of § 922(o) to prohibit the possession of machine guns made on or after May 19, 1986 for personal purposes. By order dated January 6, 1989, this court rejected BATF's interpretation and held that § 922 (o) authorizes private citizens to make and register machine guns so long as all legal registration requirements are satisfied. In so holding, this court admitted that § 922(o) was susceptible to more than one interpretation, but concluded that BATF's interpretation was contrary to the plain wording of the statute when read against the prior usage and practice. *See Slip Op.*, at p. 7-12.

Having concluded that the BATF's interpretation of § 922(o) is unreasonable, this court believes that the appropriate remedy is to REMAND the matter to the BATF for consideration of plaintiff's application on its merits. The parties' respective motions for summary judgment are, therefore, DENIED. Defendant BATF is ORDERED to conduct a complete review of plaintiff's application within thirty (30) days of the receipt of this order or issue Mr. Farmer his permit.

SO ORDERED this 14th day of December, 1989.

/s/ J. Owen Forrester
J. OWEN FORRESTER
United States District Judge

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Article I, § 8, Cl. 1 & 3, U.S. Constitution :

The Congress shall have power to lay and collect taxes, duties, imposts, and excises

To regulate commerce with foreign nations, and among the several states

Second Amendment, U.S. Constitution :

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

Preamble, Firearms Owners' Protection, Act § 1, P.L. 99-308, 100 Stat. 449 (May 19, 1986) :

CONGRESSIONAL FINDINGS—The Congress finds that—

(1) the rights of citizens—

(A) to keep and bear arms under the second amendment to the United States Constitution;

(B) to security against illegal and unreasonable searches and seizures under the fourth amendment;

(C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and

(D) against unconstitutional exercise of authority under the ninth and tenth amendments;

require additional legislation to correct existing firearms statutes and enforcement policies; and

(2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of

this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes.”

18 U.S.C. § 922(o) :

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine-gun.

(2) This subsection does not apply with respect to—

(A) A transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

18 U.S.C. § 925(a) (1) :

The provisions of this chapter shall not apply with respect to the transportation, shipment, receipt, or importation of any firearm or ammunition imported for, sold or shipped to, or issued for the use of, the United States or any department or agency thereof or any State or any department, agency, or political subdivision thereof.

26 U.S.C. § 5821:

(a) Rate—

There shall be levied, collected, and paid upon the making of a firearm a tax at the rate of \$200 for each firearm made.

(b) By whom paid—

The tax imposed by subsection (a) of this section shall be paid by the person making the firearm.

(c) Payment—

The tax imposed by subsection (a) of this section shall be payable by the stamp prescribed for payment by the Secretary or his delegate.

26 U.S.C. § 5822:

No person shall make a firearm unless he has (a) filed with the Secretary or his delegate a written application, in duplicate, to make and register the firearm on the form prescribed by the Secretary or his delegate; (b) paid any tax payable on the making and such payment is evidenced by the proper stamp affixed to the original application form, in such manner as the Secretary or his delegate form; (c) identified the firearms to be made in the application form, in such manner as the Secretary or his delegate may by regulations prescribe; (d) identified himself in the application form in such manner as the Secretary or his delegate may by regulation prescribe, except that, if such person is an individual, the identification must include his fingerprints and his photograph; and (e) obtain the approval of the Secretary or his delegate to make and register the firearm and the application form shows such approval. Applications shall be denied if the making or possession of the firearm would place the person making the firearm in violation of the law.

26 U.S.C. § 5841:

(a) Central registry—

The Secretary or his delegate shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include—

- (1) identification of the firearm;
 - (2) date of registration; and
 - (3) identification and address of person entitled to possession of the firearm;
- (b) By whom registered—

Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferror.

(c) How registered—

. . . Each importer, maker, and transferror of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner, as required by this chapter or regulations issued thereunder to import, make or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

27 C.F.R. 179.105:

(c) . . . [*M*]anufacture. . . . Manufacturers qualified under this part may . . . manufacture machine guns on or after May 19, 1986, for sale or distribution to any department or agency of the United States or any State or political subdivision thereof The registration of such machineguns under this part and their subsequent transfer shall be conditioned upon and restricted to the sale or distribution of such weapons for the official use of Federal, State or local governmental entities. Subject to compliance with the provisions of this part, manufacturers qualified under this part may manufacture machineguns on or after May 19, 1986, for exportation in compliance with the Arms Export Control Act (22 U.S.C. 2778) and regulations prescribed thereunder by the Department of State. . . .

(e) *The making of machineguns on or after May 19, 1986.* Subject to compliance with the provisions of this part, applications to make and register machineguns on or after May 19, 1986, for the benefit of a Federal, State or local governmental entity (e.g., an invention for possible future use of a governmental entity or the making of a weapon in connection with research and development on behalf of such an entity) will be approved if it is established by specific information that the machinegun is particularly suitable for use by Federal, State or local governmental entities and that the making of the weapon is at the request and on behalf of such an entity.

(2)

No. 99-600

FILED

DEC 13 1990

JOSEPH P. SPANOL, JR.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

J. D. FARMER, JR., PETITIONER

v.

**STEPHEN E. HIGGINS, DIRECTOR
BUREAU OF ALCOHOL, TOBACCO & FIREARMS**

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

**KENNETH W. STARR
*Solicitor General***

**STUART M. GERSON
*Assistant Attorney General***

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***Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the Gun Control Act of 1968, as amended by the Firearms Owners' Protection Act of 1986, prohibits private persons from possessing or transferring machine guns.

2. Whether Congress has the power under the Commerce Clause to prohibit the private possession and transfer of machine guns.

3. Whether Congress's decision to prohibit the private possession and transfer of machine guns violates the Second Amendment.



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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-600

J. D. FARMER, JR., PETITIONER

v.

STEPHEN E. HIGGINS, DIRECTOR
BUREAU OF ALCOHOL, TOBACCO & FIREARMS

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT*

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 907 F.2d 1041. The district court's opinions (Pet. App. 12a-25a, 25a-33a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 11, 1990. A petition for rehearing was denied on August 30, 1990. Pet. App. 10a-11a. The petition for a writ of certiorari was filed on October 10, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The manufacture, possession and transfer of machine guns is regulated by the Gun Control Act of 1968, as amended, 18 U.S.C. 921 *et seq.*, and by Chapter 53 of the National Firearms Act (NFA), 26 U.S.C. 5801 *et seq.* (NFA). The National Firearms Act adopts application and registration requirements for persons desiring to make certain types of firearms, including machine guns. 26 U.S.C. 5821, 5822, and 5841.¹ The Act requires the Bureau of Alcohol, Tobacco and Firearms (ATF) to deny any application to make a firearm if the making or possession of the firearm would place the applicant in violation of law. 26 U.S.C. 5822. See also 26 U.S.C. 5812 (parallel provision regarding transfer of firearms). Thus, in reviewing applications under the National Firearms Act, the agency must determine whether approval is precluded by the Act itself, or by any other provision of law.

The Firearms Owners' Protection Act of 1986, Pub. L. No. 99-308, 100 Stat. 449, amended the Gun Control Act and restricted the transfer and possession of machine guns manufactured after May 19, 1986. Section 102 of those Amendments, 100 Stat. 453, codified at 18 U.S.C. 922(o), states:

(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.

(2) This subsection does not apply with respect to —

(a) a transfer to or by, or possession by or under the authority of, the United States or any

¹ "Firearms" as defined in the NFA include machine guns, sawed-off shotguns and rifles, and "destructive device[s]," such as bombs and grenades. 26 U.S.C. 5845.

department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect.

After enactment of the 1986 Amendments, the ATF issued implementing regulations proscribing the private possession of machine guns except as provided by the grandfather clause in 18 U.S.C. 922(o)(2)(B). See 27 C.F.R. 179.105(a) and (b). The exception for transfer or possession "by or under the authority of" federal or state governments was defined as follows, 27 C.F.R. 179.105(e):

[A]pplications to make and register machine guns on or after May 19, 1986, for the benefit of a Federal, State or local governmental entity * * * will be approved if it is established by specific information that the machine gun is particularly suitable for use by Federal, State or local governmental entities and that the making of the weapon is at the request and on behalf of such an entity.

2. In October 24, 1986, petitioner sought permission from the ATF to make and register a machine gun for his personal collection. The ATF denied the application on February 7, 1987. The denial letter advised petitioner that 18 U.S.C. 922(o) "prohibits the making and manufacture of new machineguns for possession by private citizens," and that the ATF was therefore precluded from processing petitioner's application. Pet. App. 2a.

Petitioner filed this suit in March 1987, challenging the constitutionality of 18 U.S.C. 922(o) and seeking a writ of mandamus to compel agency approval of his machine gun

application. The district court dismissed those claims (Counts I-IV) on the ground that mandamus relief was not available to compel discretionary (as opposed to ministerial) agency action. Pet. App. 12a. Although it rejected petitioner's claims, the court agreed with petitioner's submission that 18 U.S.C. 922(o) was not a general ban on the possession of machine guns, and merely barred the otherwise unlawful possession of machine guns. The court reasoned that the exemption for machine guns possessed "under [the] authority of" a governmental unit authorized "all machine guns possessed pursuant to NFA licenses issued by [the ATF]." Pet. App. 18a. Thus, in the district court's view, 18 U.S.C. 922(o) banned the possession of machine guns only where a license could not issue for some other, independent reason.

With the permission of the district court, petitioner amended his complaint to add a new count (Count V) challenging the disapproval of his application under the Administrative Procedure Act, 5 U.S.C. 701-706. Pet. App. 27a. The district court then ruled that the ATF's denial of petitioner's application was based on an erroneous interpretation of the statute. The court remanded the case to the ATF, ordering the agency to complete review of petitioner's application within 30 days of receipt of the court's order, or else to approve the application. Pet. App. 33a.

3. The government appealed. The court of appeals stayed the district court's order pending appeal, Pet. App. 3a, and on the merits reversed, holding that 18 U.S.C. 922(o) prohibits the private possession of machine guns not lawfully possessed before the date of enactment of the 1986 Amendments. Pet. App. 1a-9a. The court explained that Section 922(o) "explicitly provides that, aside from two specified exceptions, 'it shall be unlawful for any person to transfer or possess a machine gun.'" Pet. App. 6a.

The district court's interpretation of the exception for machine guns possessed "under the authority of" a governmental entity, the court of appeals noted, would substantially vitiate the general prohibition and thereby render the statute meaningless. Moreover, the legislative history of the Firearms Owners' Protection Act of 1986, the court found, demonstrated clearly that this exception was intended to authorize only the possession of machine guns for the benefit of federal, state, or local governments. Pet. App. 7a. Finally, the court rejected petitioner's constitutional claims without discussion on the ground that they were meritless. *Id.* at 9a.

ARGUMENT

The decision below does not conflict with any decision of this Court or of another court of appeals and presents no question of public importance warranting this Court's review. After analyzing the text and legislative history of Section 922(o), the court of appeals correctly upheld the ATF's conclusion that Congress prohibited the possession of machine guns except (as relevant here) when authorized for the benefit of governmental entities, such as in the case of law enforcement officers. The court of appeals also correctly recognized that petitioner's Commerce Clause and Second Amendment arguments are plainly without merit. Finally, the court of appeals was correct in noting that this is a case of "first impression." Pet. App. 1a. Under these circumstances, further review by this Court is not warranted.

1. The Firearms Owners' Protection Act of 1986, with two exceptions, prohibits the possession or transfer of a machine gun. 18 U.S.C. 922(o)(1). The exception created by the "grandfather clause" for machine guns lawfully possessed before the Act became law, 18 U.S.C.

922(o)(2)(B), is clearly inapplicable here, because the gun in question has not yet been created. At issue instead is the scope of the other exception, which is limited to "possession by or under the authority of" the federal, a state, or a local government. 18 U.S.C. 922(o)(2)(A). The ATF has determined that private parties like petitioner cannot take advantage of that exception, and that conclusion, as the Eleventh Circuit explained, follows from the text and legislative history of the 1986 Act. Pet. App. 5a-9a.

Before the Firearms Owners' Protection Act of 1986 became law, a person could possess a machine gun if he satisfied the requirements of the National Firearms Act. 26 U.S.C. 5822. The ATF reviewed applications to manufacture such guns under that law, and would deny an application if granting it would place the applicant in violation of the law. 26 U.S.C. 5822. For example, the ATF would deny an application from a convicted felon to manufacture a machine gun because the possession of a firearm by a convicted felon would violate 18 U.S.C. 922(g). The Firearms Owners' Protection Act of 1986 for the first time flatly prohibited the transfer and possession of machine guns. That ban affected not only private parties, but also military authorities and law enforcement officers, since they are "authorized" by federal law to carry firearms, which can (and sometimes does) include machine guns. *E.g.*, 18 U.S.C. 3052 (FBI agents), 3053 (United States Marshals and their deputies), and 3056(c)(1)(B) (Secret Service agents); 50 U.S.C. 403f(d) (CIA personnel). Congress therefore created the exemption in 18 U.S.C. 922(o)(2)(A) in order to ensure that such parties would still be able to possess machine guns after the Firearms Owners' Protection Act of 1986 went into effect.

Petitioner contends that the exception enables the ATF to "authorize" the manufacture of a machine gun as long as the applicant satisfies the requirements of the

National Firearms Act, 26 U.S.C. 5822. But that interpretation of 18 U.S.C. 922(o)(2)(B) renders superfluous the general prohibition on the possession of machine guns in 18 U.S.C. 922(o)(1), because the National Firearms Act already outlawed the unauthorized manufacture of a machine gun. Section 922(o)(1), under petitioner's theory, did not change the status quo. Congress clearly held the contrary view, however, as proven by the grandfather clause. Petitioner's interpretation of the Firearms Owners' Protection Act of 1986 is therefore clearly unreasonable.

The ATF's interpretation of the Firearms Owners' Protection Act of 1986 is also consistent with its legislative history. See Pet. App. 7a-9a. Section 922(o) was introduced "as a last minute amendment in the House of Representatives," Pet. App. 7a, and the members of the Senate sought to clarify their understanding of its reach. 132 Cong. Rec. 9600 (1986) (remarks of Sen. Dole). In a colloquy with Senator Dole, Senator Hatch explained that the exception would permit sales for military or police use, or to a licensed dealer for resale to the military. *Ibid.* He emphasized that:

This provision certainly was not intended to disrupt in the slightest the current processes for supply of weaponry to our military or police forces. This amendment was designed to deal with crime guns, not weapons used to fight crime on a domestic or international scale.

Ibid. The Senators then clarified that sales under the Arms Export Control Act would fall within the exemption, and that private researchers performing government services would also be exempt. *Ibid.* Finally, the Senators discussed whether the "under the authority of" phrase would allow a local police force to authorize its officers to purchase a machine gun to be owned by the officer rather than

the police. *Id.* at 9601 (remarks of Sen. Dole). Senator Hatch responded that, *ibid.*:

possession or transfer of those weapons would cease to enjoy the authorization of the State agency or subdivision when the officer was no longer on the police force. The police force would then have to exercise its authority to guarantee that the machinegun was transferred to another entity authorized by the State or the United States to possess such weaponry.

This colloquy is irreconcilable with petitioner's construction of Section 922(o). The Senators would not have been at pains to define when possession was "under the authority" of the United States if individuals could still obtain approval from the ATF to possess machine guns for their own use. Distinctions such as those between police officers and former police officers would be meaningless. Indeed, if petitioner's interpretation of the Act were correct, there would have been no need to discuss the scope of its exceptions at all.²

² After the Dole-Hatch colloquy was placed into the record, Senator Metzenbaum, who had not yet read its text, cautioned that the colloquy would not necessarily represent the views of the entire Senate. Senator Hatch explained however that:

the colloquys [*sic*] that have been put in the *Record* as of now do reflect the intentions of the sponsors of the bill. There is no question about it. We think that they state basically what the bill is. Moreover many other Senators have asked the questions covered by this colloquy. They endorse these statements and are anxious to have their understanding made part of this *Record*.

132 Cong. Rec. 9601 (1986). Senator McClure concurred, explaining that "what we are trying to do is provide some legislative history as to our understanding of what the House provision means." *Ibid.* Senator Kennedy then inserted a colloquy between himself and Senator Metzenbaum on the machine gun prohibition. The Metzenbaum-Kennedy colloquy reflects agreement as to the fact that "the House

Relying on Justice Scalia's concurring opinion in *Crandon v. United States*, 110 S. Ct. 997 (1990), petitioner maintains that the ATF's construction of Section 922(o) is not entitled to deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), because the ATF brings criminal prosecutions under Title 18 for violations of the gun control laws. Pet. 18-20. That argument lacks merit. The ATF is a component of the Department of the Treasury and does not bring criminal prosecutions under the gun control laws; instead, that authority is vested in the Department of Justice. 28 U.S.C. 516. At the same time, the ATF does have administrative responsibilities under the federal gun control laws, as explained above. The ATF's interpretation of the Firearms Owners' Protection Act of 1986 is therefore entitled to deference under *Chevron*. See *National Rifle Ass'n v. Brady*, No. 89-3345 (4th Cir. Sept. 13, 1990), slip op. 5-9 (ruling that *Chevron* applies to the ATF's interpretation of the Firearms Owners' Protection Act of 1986).

2. Petitioner argues that the prohibition on the private ownership of machine guns in 18 U.S.C. 922(o) exceeds

version, which we are about to vote on here, has a very important improvement from the bill the Senate adopted last July, and that is to ban the transfer, possession of any machine gun not lawfully possessed on the date of enactment." *Id.* at 9602 (remarks of Sen. Metzenbaum). The only disagreements expressed by this colloquy with the earlier Dole-Hatch colloquy concerned whether the grandfather clause would apply to existing parts of machine guns and whether an amnesty could be declared for individuals unlawfully possessing machine guns. *Ibid.* Senator Lautenberg then expressed approval of improvements added by the House version of the bill, including the fact that the House version "bars future sales and possession of machine guns by private citizens." *Id.* at 9605. See also *ibid.* (remarks of Sen. Durenberger). In sum, the text and legislative history of the statute fully demonstrate that the ATF's interpretation of the Act is reasonable.

Congress's power under the Commerce Clause. Pet. 22-25. That claims lacks merit.

Congress has plenary authority to regulate interstate commerce by any rational means, which includes the regulation of intrastate activities that, considered as a class, have an effect on interstate commerce. See, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942); *United States v. Visman*, No. 89-10630 (9th Cir. Nov. 28, 1990), slip op. 14698. For example, *Wickard v. Filburn*, *supra*, held that Congress has the authority under the Commerce Clause to regulate wheat grown wholly for home consumption even though that activity was purely local and was not regarded as commerce, because a wheat grower might otherwise purchase wheat on the open market. 317 U.S. at 125. This case fits comfortably within the rationale of the *Filburn* case.

Perez v. United States, *supra*, is directly analogous. *Perez* upheld the constitutionality of the Consumer Credit Protection Act, 18 U.S.C. 891, which made it a federal offense to engage in "loan sharking" activities. *Perez* was convicted for purely intrastate activities that had no specific connection to interstate commerce. The Court rejected his contention that such a nexus was a prerequisite to the lawful exercise of congressional authority, even in a criminal case. The Court emphasized that when Congress chooses to regulate a class of activity without proof of connection to interstate commerce "the only function of [the] courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." 402 U.S. at 152 (quoting *United States v. Darby*, 312 U.S. 100, 120-121 (1941)). "Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce." 402 U.S. at 154.

"Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise as trivial, individual instances' of the class." *Ibid.* (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968)).

Petitioner relies on *United States v. Bass*, 404 U.S. 336 (1971), Pet. 22-23, but that case is inapposite. *Bass* involved a question of statutory interpretation. At issue was a law prohibiting a convicted felon from receiving, possessing, or transporting a firearm "in commerce or affecting commerce," and the question was whether that phrase applied to the possession and receipt of a firearm, as well as to its transfer. The Court found unclear whether that law required proof of a specific nexus with interstate commerce, and resolved the ambiguity in the defendant's favor, ruling that the above-quoted phrase applied to all three offenses. *Bass* did not hold that Congress lacks the power to regulate the intrastate manufacture of machine guns. See *Scarborough v. United States*, 431 U.S. 563 (1977) (treating *Bass* as a statutory interpretation case).³

3. Finally, the Gun Control Act of 1968 does not violate the Second Amendment. In *United States v. Miller*, 307 U.S. 174 (1939), the only decision by this Court con-

³ To the extent that *Bass* sheds any light on this matter, it suggests a conclusion contrary to that proposed by petitioner. In *Bass*, the court of appeals had stressed that a different statutory interpretation would raise serious constitutional questions. This Court specifically observed that it affirmed "for substantially different reasons" than those given by the court of appeals, and expressly noted that it did not reach the constitutional issues. 404 U.S. at 338-339 & n.4. As one leading commentator has observed, "[s]ince the Supreme Court made most of the same points as the Second Circuit with respect to the language of the statute, its structure and its legislative history, it is obvious that what the Court was *not* accepting from the Second Circuit was the suggestion of substantial constitutional doubt upon which that court also relied." Stern, *The Commerce Clause Revisited—The Federalization of Intrastate Crime*, 15 Ariz. L. Rev. 271, 282 (1973). 1

struing the Second Amendment in this century, the Court rejected a challenge to provisions of the National Firearms Act prohibiting the interstate transportation of an unregistered firearm. The Court found no evidence that the firearm (a sawed-off shotgun) "has some reasonable relationship to the preservation or efficiency of a well regulated militia," and held that the possession of that firearm did not fall within the rights guaranteed by the Second Amendment. *Id.* at 178. Since *Miller*, the lower federal courts have concluded that the mere allegation that a firearm might be of value to a militia is insufficient to establish a right to possess that firearm under the Second Amendment. See, e.g., *Cases v. United States*, 131 F.2d 916, 922-923 (1st Cir. 1942), cert. denied, 319 U.S. 770 (1943); *Cody v. United States*, 460 F.2d, 34, 36-37 (8th Cir.), cert. denied, 409 U.S. 1010 (1972); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. Warin*, 530 F.2d 103 (6th Cir.), cert. denied, 426 U.S. 948 (1976). Petitioner does not suggest that the decision below conflicts with those rulings. In the absence of such a conflict, the decision below does not warrant review by this Court. Finally, the court of appeals in *Warin*, which like this case involved a machine gun, observed that the Second Amendment does not absolutely bar all congressional regulation of firearms. 530 F.2d at 107. Congress's decision flatly to prohibit the private possession of this particular type of weapon is surely reasonable. See *id.* at 107-108.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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(5)

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JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

J.D. FARMER, JR.,

Petitioner

v.

STEPHEN E. HIGGINS,
DIRECTOR, BUREAU OF ALCOHOL, TOBACCO & FIREARMS,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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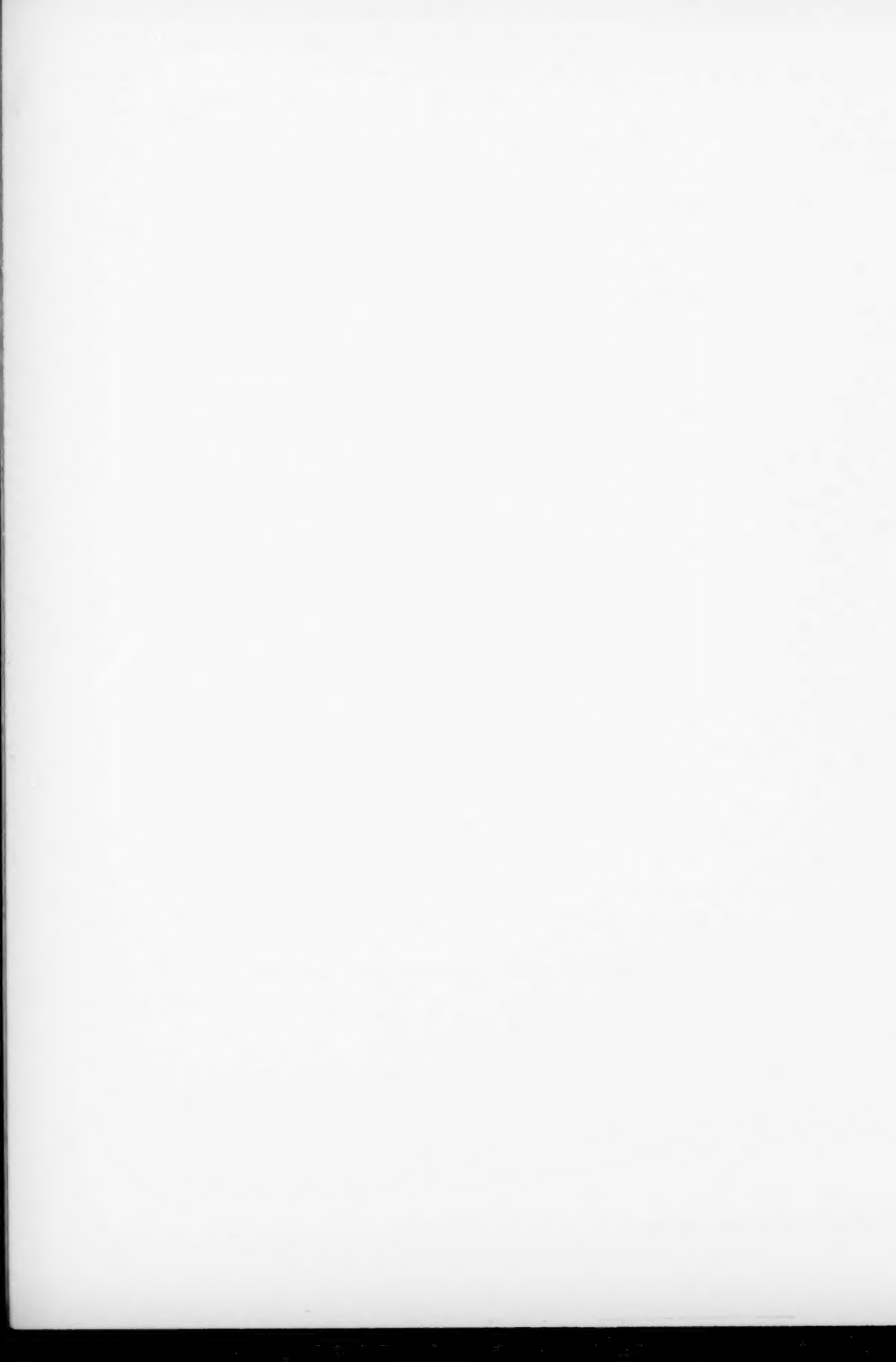
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ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI TO PRECLUDE THE SUPPLANTING OF THE CLEAR LANGUAGE OF AN IMPORTANT STATUTE BY AN AMBIGUOUS "INTENT" BASED ON AN UNSPOKEN COLLOQUY

Like the Court of Appeals, the respondent fails to address the clear meaning of the language of 18 U.S.C. § 922(o) "under the authority of," which simply means permission. Instead of addressing the meaning of "authority," respondent argues that petitioner's (and the district court's) interpretation would not change the status quo, thereby rendering the statutory amendment an absurd result. (Brief for the Respondent in Opposition at 7.)

Respondent fails to address the clear holding of this Court that Congress can make conduct illegal in one statute, and then make the same conduct illegal again in a separate statute. *United States v. Batchelder*, 442 U.S. 114, 120-21 (1979) (two Gun Control Act statutes making possession of firearm by felons in interstate commerce unlawful). Respondent also fails to address the fact that 18 U.S.C. § 922(o) did change existing law, because it shifted the burden of proof for possession of a machinegun, removing the government's burden to prove that the machinegun is not registered under the National Firearms Act. See Petition for a Writ of Certiorari at 12-13.

Respondent would supplant the clear language of the statute with an ambiguous comment made by Senator Hatch concerning police ownership in an unspoken colloquy inserted into the record and disputed by Senator Metzenbaum. Brief for the Respondent at 8. Respondent completely disregards the preamble to the Firearms Owners' Protection Act voted on by all members of Congress, reaffirming that "this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." § 1, P.L. 99-308, 100 Stat. 449 (1986).

II. THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THAT THE RULE OF LENITY, NOT DEFERENCE TO AGENCIES, APPLIES TO INTERPRETATION OF A CRIMINAL STATUTE

Respondent fails to address this Court's holding in *Crandon v. United States*, 110 S.Ct. 997, 1001-02, 1007 (1990) and its predecessors that an ambiguous criminal statute must be interpreted according to the rule of lenity against the government and in favor of those to whom a criminal law applies. Instead, respondent mentions Justice Scalia's concurring opinion in *Crandon* that in interpretation of a criminal statute, the courts owe no deference to an agency under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Brief for the Respondent at 9.)

However, respondent is unable to squeeze from Justice Scalia's opinion any support for the argument that the courts must defer to ATF interpretations of Title 18, the criminal code, because "the ATF is a component of the Department of the Treasury and does not bring criminal prosecutions under the gun control laws; instead, that authority is vested in the Department of Justice. . . . The ATF's interpretation of the Firearms Owners' Protection Act of 1986 is therefore entitled to deference. . . ." Brief for the Respondent at 9.

The above argument was flatly rejected in *Federal Communications Commission v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954), which invalidated regulations under the criminal code as beyond the statutory prohibition, because "penal statutes are to be construed strictly." In that case, the FCC sought by regulation to make "give-away" programs illegal, while the statute only made gambling-related broadcasts illegal. ABC sought an order enjoining the regulations.

The FCC was empowered to "make such rules and regulations . . . as may be necessary in the executions

of its functions. . . ." *Id.* at 290 n.7. Just as ATF administers licensing and the Department of Justice handles prosecutions under the Gun Control Act, the FCC and the Department enforced the statutes concerning communications. "But the Commissioner's power is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under [the statute], the Commission cannot employ the statute to make them so by agency action." *Id.* at 290.

The Court held that a criminal statute must be construed the same in both civil and criminal proceedings, i.e., strictly against the government and in favor of persons regulated by the statute:

It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. *There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases.* We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly. *Id.* at 296 (emphasis added).

The rule of strict construction requires that power to promulgate regulations under a criminal statute—such as the Gun Control Act—be narrowly construed, and that conduct not clearly made criminal by statute cannot be made so by regulation. As noted by the Supreme Court in *American Broadcasting*, Congress had not specifically prohibited the conduct in question by statute. "The Commission now seeks to accomplish the same result through agency regulations. In doing so, the Commission has overstepped the boundaries of interpretation and hence has exceeded its rulemaking power." *Id.* ATF's behavior is no different.

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE, AS INTERPRETED BY THE COURT OF APPEALS, THIS IS THE FIRST FEDERAL BAN ON POSSESSION OF FIREARMS BY LAW ABIDING CITIZENS IN AMERICAN HISTORY, AND ITS CONSTITUTIONAL IMPLICATIONS ARE STAGGERING

A. Exercise Of A Power Under The Interstate Commerce Clause Requires that a Class Of Activities Have Some Minimal Effect On Interstate Commerce

This Court should not allow this matter to evade review because the Court of Appeals curtly found petitioner's unspecified "remaining arguments" to be "without merit." App. 9a. As interpreted by the Court of Appeals, this is the first federal ban in American history on possession by law-abiding persons of any type of firearm.

Nothing in § 922(o), the Congressional findings, or the legislative history suggest that Congress was exercising a power enumerated in Article I, § 8 of the Constitution, such as that Congress found mere possession of this firearm to be a burden on establishing post offices, coining money, or interstate commerce. The only evidence in the legislative record was the testimony of respondent Higgins that registered machineguns are virtually never used in crime and are not a law enforcement problem. Legislation to Modify the 1968 Gun Control Act: Hearings Before the House Judiciary Committee, 99th Cong., 1st & 2nd Sess., at 1165 (1987).¹

¹ Amici Center to Prevent Handgun Violence cites this source to show that machineguns are used in crime. (Brief at 5 n.7), but the testimony actually refers as well to handguns, semi-automatics and other types of firearms, and certainly not to *registered* machineguns. There is no evidence in the legislative record of a registered machinegun *ever* being used in a crime since passage of the National Firearms Act of 1934. 132 CONG. REC. S5363 (May 6, 1986) (statement of Senator Hatch). There is no mention of interstate commerce whatever, much less that possession of

Even without any interstate commerce nexus being suggested in the statute, its findings, or in the legislative record, respondents assume that Congress exercised its interstate commerce power in passage of § 922(o). Brief for the Respondent at 10-11. None of the cases cited by respondent upheld an exercise of the interstate commerce power under these conditions.

In sharp contrast to the case at bar, in *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 116 (1942), the statute provided that the Secretary of Agriculture "shall regulate in the manner hereinafter in this section provided, only such handling of such agricultural commodity or product thereof, as is *in the current of interstate or foreign commerce*, or which *directly burdens, obstructs, or affects, interstate or foreign commerce* in such commodity or product thereof." (Emphasis added.) Similarly, in *Wickard v. Filburn*, 317 U.S. 111, 125 (1942), the Court found that activity may "be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . ." Accordingly, the Court upheld regulation of wheat growing because it is an *economic* activity with a collective, substantial effect on interstate commerce.² *Id.* at 124-125.

machineguns (particularly registered ones) affect interstate commerce.

Amici Center (at 5 n.8) also cites the 1985 FBI Uniform Crime Reports, *Law Enforcement Officers Killed and Assaulted* 29-36. This could not have been considered by Congress, because it was not published until summer of 1986, after the Act passed. The Center claims that the Reports found four (4) fatalities from "automatic weapons," but one of these involved a ".25 cal. automatic handgun," which is clearly a semiautomatic pistol. *Id.* at 33. Moreover, the Reports found that of 78 felonious homicides of officers in 1985, the following weapons were used: handguns, 58; shotguns, 9; rifles, 3. Eleven (11) officers were killed with their own service arms. *Id.* at 12.

² Nor was respondent being candid with the Court in citing *United States v. Visman*, No. 89-10630 (9th Cir. Nov. 28, 1990),

In *Perez v. United States*, 402 U.S. 146, 155 (1971), the Supreme Court upheld a federal statute prohibiting loansharking because "the findings by Congress are quite adequate" to show that loansharking involves large-scale credit transactions and interstate economic activity, and thus affects interstate commerce. The Court cited extensive testimony and studies relied on by Congress to demonstrate the effects of loansharking on interstate commerce. "The essence of all these reports and hearings was summarized and embodied in formal congressional findings." *Id.* at 156.³

Respondent's quotations from *Perez* carefully delete any mention by the Court of the Congressional findings and extensive evidence in support concerning the effect on interstate commerce. For instance, respondent quotes only the second of the following sentences, ignoring the itali-

slip op. 14698 [190 U.S.App.Lexis 20621], since that decision was based on factual findings passed by Congress:

Title 21 U.S.C. § 801 contains the introductory provisions to the Drug Act, including Congressional findings and declarations. In § 801, Congress specifically found that a nexus exists between marijuana and interstate commerce. Congress concluded that controlled substances have a "detrimental effect on the health and general welfare of the American people." 21 U.S.C. § 801(2). Congress also found that "local distribution and possession of controlled substances contribute to swelling the interstate traffic in such substances." 21 U.S.C. § 801(4). Congress also found that "federal control of the intrastate incidents of the traffic in controlled substances is essential to the effective control of the interstate incidents of such traffic." 21 U.S.C. § 801(6).

³ The Court in *Perez* quoted the findings of Congress in the act involved as follows:

Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce. *Id.* at n.1.

cized portion: “Sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act. . . . In passing on the validity of the class last mentioned the only function of the courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.” *Id.* at 152 (emphasis added).

Finally, respondent completely ignores the fact that *United States v. Bass*, 404 U.S. 336 (1971) construed the statutory ambiguity in favor of a criminal defendant to avoid any constitutional problem under the commerce clause. Brief for Respondent at 11. “We do not reach the question whether, upon appropriate findings, Congress can constitutionally punish the ‘mere possession’ of firearms. . . .” 404 U.S. at 339 n.4 (emphasis added). “Absent proof of some interstate commerce nexus in each case, [a ban on possession of firearms by felons] dramatically intrudes upon traditional state criminal jurisdiction.” *Id.* at 350. Thus, the Court’s required showing of an interstate commerce nexus “preserves as an element of all the offenses a requirement suited to federal criminal jurisdiction alone.” *Id.* at 351.

B. The Second Amendment Precludes A Ban On Mere Possession Of A Type Of Firearm By a Law-Abiding Citizen

The Court of Appeals ruling is in conflict with *United States v. Miller*, 307 U.S. 174, 178 (1939), which recognized the test for Second Amendment protection to be whether an arm is ordinary military equipment or could contribute to the common defense.⁴ Contrary to respondent, *Miller* did not “hold” that possession of a short barreled shotgun (an arm not involved in the case at bar) is not protected by the Second Amendment. Brief for Respondent at 12. Instead, the Court stated that there

⁴ The district court agreed with petitioner’s interpretation of *Miller*. App. 21a.

was an “absence of any evidence” in the record, and “it is not with judicial notice that this weapon is any part of the ordinary military equipment. . . .” *Id.* Accordingly, the Court remanded the case to the district court, where an evidentiary hearing would have been available on that issue.

Respondent fails even to mention *United States v. Verdugo-Urquidez*, 108 L.Ed.2d 222, 232-32, 110 S.Ct. 1056, 1060-61 (1990), which noted that “‘the people’ protected by the Fourth Amendment and by the First and Second Amendments . . . refers to a class of persons who are part of a national community. . . .” Amici Center to Prevent Handgun Violence (Brief at 11 n.15) would change the Court’s wording to recognize Second Amendment protection only to “a class of persons” who are “part of an organized state militia.”⁵

The Second Amendment was clearly intended to protect an individual right to keep and bear private arms for lawful purposes generally. In *The Federalist* No. 46, James Madison referred to “the advantage of being armed, which the Americans possess over the people of almost every other nation.”⁶ Madison continued: “Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as the public resources will bear, the governments are afraid to trust the people with arms.”⁷

Ten days after Madison introduced the Bill of Rights in the House of Representatives, Tench Coxe published

⁵ Both Respondent (at 12) and Amici Center (at 10) cite lower court decisions which include dictum inconsistent with both *Miller* and *Verdugo-Urquidez*. However, none of these cases addressed a ban on possession of firearms by law-abiding citizens, but instead dealt with unregistered machineguns or firearms possessed by felons over which an interstate commerce nexus existed.

⁶ 15 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 492 (1986).

⁷ *Id.* at 493.

his "Remarks on the First Part of the Amendments to the Federal Constitution,"⁸ which included the following: "As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms."

The Senate rejected an explicit reservation of the state power to maintain militias as proposed by the Virginia convention: "That each state, respectively, shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. . . ."⁹ This highlighted the clear distinction between the "right" of "the people" to keep and bear arms, and the "power" of the "state" to arm and provide for militias.

The Senate also rejected a proposal to add "for the common defence" after "bear arms" in the Second Amendment.¹⁰ Had it succeeded, recognition of "the right of the people to keep and bear arms for the common defense" would have still been an individual right to have arms, but could have been interpreted as allowing arms to be kept only for common defense against foreign aggression or domestic tyranny, or that only military arms could be kept.

Neither the Supreme Court nor the appellate courts have considered the advanced historical scholarship published on the Second Amendment in the past decade.¹¹

⁸ Federal Gazette (Philadelphia), June 18, 1789, at 2, col. 1.

⁹ JOURNAL OF THE FIRST SESSION OF THE SENATE 75 (1820).

¹⁰ *Id.* at 77.

¹¹ See S. Levin, *The Embarrassing Second Amendment*, 99 YALE L.J. 637 (1989).

Given the fundamental nature of Bill of Rights guarantees and the passage of the first federal ban on possession of a type of firearm by law-abiding citizens in American history, this Court should grant certiorari.

CONCLUSION

The Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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No. 90-600

Supreme Court. U.S.

F I L E D

DEC 13 1990

JOSEPH P. SPENCER, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

J.D. FARMER, JR.,

Petitioner,

v.

STEPHEN E. HIGGINS,
DIRECTOR, BUREAU OF ALCOHOL, TOBACCO
& FIREARMS,

Respondent.

BRIEF AMICUS CURIAE
OF ARIZONA IN SUPPORT OF THE PETITION FOR
WRIT OF CERTIORARI TO THE ELEVENTH
CIRCUIT COURT OF APPEALS

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1911

UNITED STATES CONSTITUTION

THE SECOND AMENDMENT

1791

AMERICAN BIBLE SOCIETY
101 N. 2ND ST. PHILA.

QUESTION PRESENTED

Is the absolute ban on the possession by all citizens of machine guns not lawfully possessed prior to May 19, 1986, a violation of the right of the people to keep and bear arms under the Second Amendment to the United States Constitution?

QUESTIONS PRESENTED

Is the application for the
franchise of all citizens of America
and not including persons who may
be, 1900, a violation of the right to
the people of the land and the right to
the same franchise to the state
of the Union?

INTEREST OF AMICUS CURIAE

Amicus Curiae, the states of Arizona has a strong interest in the protection of its citizens' right to keep and bear arms under the Second Amendment to the United States Constitution. The absolute ban of machine guns not lawfully possessed prior to May 19, 1986 by the Firearms Owners' Protection Act as interpreted by the Court of Appeals directly impinges on this fundamental right. As parens patriae, the State of Arizona submits this brief to assist this Court in the resolution of this petition for certiorari and urge that the petition be granted.

ARGUMENT

An Absolute Ban Would
Violate The Right Of The
People To Keep And Bear Arms
Under The Second Amendment

The Second Amendment to the U.S. Constitution provides: "A Well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed."

In United States v. Miller, 307 U.S. 174 (1939), this Court remanded to the trial court the question of whether a short-barrel shotgun was an instrument covered by the Second Amendment. This Court said:

Certainly it is not within jurisdictional notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178.

A machine gun, however, is clearly a weapon used by the military and is therefore a weapon which contributes to the common defense.

United States v. Miller also makes clear that the Second Amendment's right to bear and keep arms applies to civilians, i.e. citizens.

[T]he common view was that adequate defense of country and laws could be secured through the Militia -- civilians primarily, soldiers on occasion.

307 U.S. at 179.

This Court went on and later stated:

And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Id.

In this case, the absolute prohibition by Congress of a weapon

a machine was, however, in almost
a machine used by the subject and in
addition a machine which contributed to
the current debate.

Portrait of a man also stated
that the second photograph was
of a man and was taken in
the city of New York.

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The person who was
in the first photograph
was the same person who
was in the second
photograph.

which is undisputedly used as ordinary military equipment would deprive the citizens of their right to keep and bear such a weapon. A weapon which the Constitution contemplated would be kept by the citizens and, if called upon to defend the country, to be used for their common defense. Therefore, this absolute ban is in violation of the text and spirit of the Second Amendment.

which is undoubtedly used in various
different ways and for different
purposes of their kind in the East and West
and a variety of weapons which the
civilized world has never
known and, it is called upon to
defend the country, as we need for their
own defense. Therefore, this
country has in its possession of the land
and spirit in the world and the world.

CONCLUSION

Amicus Curiae, the State of Arizona, prays that the writ of certiorari be granted and that this Court should reaffirm the inviolable right granted to the citizens under the Second Amendment to the Constitution.

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DEC 13 1990

JOSEPH F. SPANIOLO, JR.
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IN THE
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OCTOBER TERM, 1990

J.D. FARMER, JR.,

v.

Petitioner,

STEPHEN E. HIGGINS, DIRECTOR, BUREAU OF ALCOHOL,
TOBACCO & FIREARMS,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF FOR THE CENTER TO PREVENT HANDGUN
VIOLENCE LEGAL ACTION PROJECT, NATIONAL
FRATERNAL ORDER OF POLICE, INTERNATIONAL
ASSOCIATION OF CHIEFS OF POLICE, MAJOR
CITY CHIEFS, NATIONAL ASSOCIATION OF
POLICE ORGANIZATIONS, NATIONAL ORGANIZATION
OF BLACK LAW ENFORCEMENT EXECUTIVES,
POLICE EXECUTIVE RESEARCH FORUM,
AND POLICE FOUNDATION AS *AMICI CURIAE*
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December 13, 1990



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**BRIEF FOR CENTER TO PREVENT HANDGUN
VIOLENCE, ET AL., AS AMICI CURIAE**

This brief is submitted on behalf of *amici curiae* in opposition to the petition for certiorari. By letters filed with the Clerk of the Court, petitioner J.D. Farmer, Jr. and respondent Stephen E. Higgins, Director, Bureau of Alcohol, Tobacco & Firearms have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The Center to Prevent Handgun Violence and seven major law enforcement organizations have joined together to submit this *amicus* brief out of a shared concern that the availability of machine guns to the general public, as sought by petitioner herein, presents an unacceptable threat to public safety.

The *amici* are the following organizations:

The *Center to Prevent Handgun Violence* is a non-profit organization dedicated to reducing deaths and injuries from the misuse of firearms.

The *National Fraternal Order of Police* is the largest member organization of professional law enforcement officers in the United States, representing over 217,000 federal, state and local law enforcement professionals from the rank of police officer to chief.

The *International Association of Chiefs of Police* is the world's largest association of police executives, representing more than 15,000 members from the United States and 67 other countries.

The *Major City Chiefs* is made up of the chief executives of 47 of the larger city police departments in the United States.

The *National Association of Police Organizations* represents over 100,000 rank-and-file police officers throughout the nation.

The *National Organization of Black Law Enforcement Executives* is an organization of police chiefs, command-level law enforcement officials, criminal justice educators and others interested in opening

channels of communication between law enforcement and the community.

The *Police Executive Research Forum* is the national professional association of chief executives of large- and medium-sized city, county and state police departments. The Forum's general members have responsibility for the delivery of police services to over thirty percent of the nation's population.

The *Police Foundation* engages in research and experimentation to test the practices of police agencies as a means of enhancing the ability of the police to control crime, maintain order and deliver services to citizens.

Each of the *amici* has a substantial interest in this case. Through its Legal Action Project, the Center to Prevent Handgun Violence participates as *amicus curiae* in litigation, often in opposition to the National Rifle Association,¹ to protect the authority of government to enact and enforce reasonable laws to prevent gun violence. The seven law enforcement organizations represent the police officers who, together with the communities they serve, face the threat of gun violence by heavily armed drug dealers, gang members and organized criminals. The support of the law enforcement community was critical to the passage of the legislation banning machine guns that petitioner now seeks to nullify by judicial action.

STATEMENT OF THE CASE

The challenged statute, 18 U.S.C. § 922(o), prohibits the private possession of machine guns not lawfully possessed before May 19, 1986. Before the enactment of Section 922(o), private ownership of machine guns was permitted if a permit was obtained from the Bureau of Alcohol, Tobacco and Firearms (the "Bureau").

In October 1986, petitioner applied to the Bureau for a permit to make and register a machine gun for

¹ Attorney Richard Gardiner, who appears on the petition as one of petitioner's counsel, is on the staff of the National Rifle Association.

possession in his personal collection. The Bureau denied his application based on Section 922(o). Petitioner asserts that the Bureau's denial of his application was in error because Section 922(o) does not prohibit the private possession of machine guns. He further asserts that if the statute does prohibit the private possession of machine guns, it violates the right to "keep and bear arms" under the Second Amendment of the United States Constitution and is beyond Congressional power under the Commerce Clause.

The court below rejected petitioner's arguments. It held that Section 922(o) clearly prohibits the private possession of machine guns not lawfully possessed before May 19, 1986, and that the Bureau's refusal to issue the petitioner a machine gun permit was therefore correct. The court also rejected petitioner's federal constitutional arguments as without merit.

SUMMARY OF THE ARGUMENT

This case presents no substantial question requiring the attention of this Court. There is no conflict among the circuits or state courts of last resort on any of the issues that petitioner offers for review. The ruling of the court below was fully consistent with the plain language and legislative history of the statute and with prior decisions of this Court.

The plain language of Section 922(o) clearly prohibits the private possession of machine guns not lawfully possessed before May 19, 1986. Petitioner's interpretation of the statute would leave prior law unaltered, thereby making the statute a nullity. Moreover, even a cursory reading of the legislative history leads to the inescapable conclusion that Congress intended to ban these extremely dangerous combat weapons.

The Second Amendment does not prohibit legislative restrictions of the kind contained in Section 922(o) on the private possession of firearms. The amendment restricts only governmental actions that adversely affect the arming of a state's organized militia. The

decided cases provide no support for petitioner's assertion that the Second Amendment creates a right to be armed for private purposes. Moreover, even if a private constitutional right to keep and bear arms did exist, it would be subject to reasonable regulation in the interest of public welfare and safety.

Contrary to petitioner's claims, Congress acted within its broad authority under the Commerce Clause when it sought to halt the nationwide proliferation of machine guns.

1 ARGUMENT

I. SECTION 922(o) PROHIBITS PRIVATE PERSONS FROM POSSESSING MACHINE GUNS NOT LAWFULLY POSSESSED BEFORE MAY 19, 1986

A machine gun is a firearm capable of automatic fire, i.e., it continues to fire as long as the trigger is depressed and there is ammunition in the magazine.² Because of this unique characteristic, machine guns are capable of extremely rapid fire. For example, tests conducted by the San Jose Police Department showed that an Uzi sub-machine gun is capable of firing an entire 30-round magazine in slightly less than two seconds.³ In addition, machine guns typically come equipped with detachable ammunition magazines holding anywhere from 30 to hundreds of rounds of ammunition.⁴ Thus, the shooter can easily and quickly replace a used magazine with a new one, making the machine gun capable of extraordinary firepower.

² For purposes of Section 922(o), the term "machine gun" is defined as

any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.

18 U.S.C. § 921(23), incorporating 26 U.S.C. § 5845(b) (1988).

³ McNamara, *Developing A Rational National Firearms Policy*, The Police Chief 26 (March 1988).

⁴ I. Hogg & J. Weeks, *Military Small Arms of the 20th Century* 69-121, 158-203, 204-208 (5th ed. 1985).

Before 1986, Congress sought to control the possession of machine guns by private persons by requiring that such persons obtain a permit from the Bureau.⁵ By 1986, however, Congress recognized that despite this regulatory regime, "machine guns ha[d] become a far more serious law enforcement problem."⁶ Law enforcement witnesses testified to an increase in crimes committed with automatic weapons⁷ and an increasing threat to police officers from criminal suspects armed with such automatic weapons.⁸

Congress therefore took steps to prohibit the private possession of machine guns. It enacted Section 922(o), which states:

- (1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun.
- (2) This subsection does not apply with respect to—
 - (A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or

⁵ 26 U.S.C. §§ 5821, 5822 and 5841 (1988).

⁶ 132 Cong. Rec. 9602 (1986) (statement of Sen. Kennedy).

⁷ See, e.g., *Legislation to Modify the 1968 Gun Control Act: Hearings Before the Subcommittee on Crime of the House Committee in the Judiciary*, 99th Congress, 1st & 2d Sess. 58-59 (1985-86) (testimony of Cornelius Behan, Chief of Police, Baltimore County, Md.); *Id.* 80-81 (testimony of Benjamin Ward, Police Commissioner, City of New York); *Id.* at 1004 (statement of Lyman H. Shaffer, former Special Agent in Charge Firearms Enforcement Branch, Bureau of Alcohol, Tobacco and Firearms); *Id.* at 1027-28 (testimony of Dr. Michael R. Matell, President, National Police Psychiatric Association); *Id.* at 1086 (statement of Captain C. Lee Thompson, Missouri State Highway Patrol). In addition, in a letter to Representative Hughes included in the hearing record, Bureau Director Higgins reported that "machine guns are the weapon of choice for a wide range of criminals." *Id.* at 224.

⁸ The Federal Bureau of Investigation reported that in 1985, police officers had been fatally wounded by automatic weapons in Missouri, Alabama, California, and South Carolina. 1985 FBI Uniform Crime Reports, *Law Enforcement Officers Killed and Assaulted* 29-36.

a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machine gun that was lawfully possessed before the date this subsection takes effect.⁹

Following enactment of Section 922(o), the Bureau issued regulations defining the exception in subsection (2) (A) to apply only to those machine guns to be made and registered "for the benefit of a Federal, State or local governmental entity."¹⁰

Petitioner challenges the Bureau's interpretation of Section 922(o). Petitioner contends that so long as he obtains a machine gun permit from the Bureau, he will possess the weapon "under the authority of the United States" and therefore will fall within proviso (2) (A) of the statute, and that the Bureau is obliged under 26 U.S.C. §§ 5821, 5822 and 5841 to grant him a permit. Petition ("Pet.") at 6-9. In effect, petitioner asserts that the law remained unchanged after enactment of Section 922(o). This reading is wholly inconsistent with both the plain language and legislative history of Section 922(o).

The plain language of Section 922(o) makes clear that the statute prohibits private possession of machine guns not lawfully possessed prior to May 19, 1986. The statute explicitly provides that except in two carefully delineated circumstances, "it shall be unlawful for any person to transfer or possess a machine gun." Petitioner's reading of the statute effectively eliminates this prohibitory language from the statute, leaving the law unchanged from the pre-1986 period. Before 1986, a private person could possess a machine gun if a permit from

⁹ Section 110(c) of the statute provides that the effective date of Section 922(o) is May 19, 1986. Pub. L. No. 99-308, § 110(c), 100 Stat. 449, 461 (1986).

¹⁰ 27 C.F.R. § 179.105(e) (1989). The regulations proscribe possession of all other machine guns not lawfully possessed before May 19, 1986. See *id.* at §§ 179.105(a) and (b).

the Bureau was obtained. Under petitioner's reading of the statute, the exact same condition applies today.

Petitioner's construction also renders superfluous the grandfather clause in Section 922(o)(2)(B). If Congress did not intend to change prior law and prohibit the private possession of machine guns after May 19, 1986, then it was wholly unnecessary to include a provision allowing for the continued private possession and transfer of machine guns lawfully possessed before that date. Because statutory language must be construed to avoid the assumption that Congress enacted legislation with no substantive effect, *United States v. Turkette*, 452 U.S. 576, 580 (1981), petitioner's artificial construction of the statute must be rejected for this reason as well.¹¹

If any doubt concerning the meaning of the statute remained after reading its plain language, the available legislative history makes crystal clear Congress' intent to enact a general machine gun ban subject to only limited exceptions. The legislation that was codified as Section 922(o) was introduced in the House by Representative Hughes, who requested "an opportunity to explain why machine guns should be banned" and observed that "I do not know why anyone would object to the banning of machine guns." 132 Cong. Rec. 7085 (1986). When the legislation was taken up in the Senate, it was similarly and repeatedly referred to as a machine gun ban. *Id.* at 9599, 9602, 9605.

¹¹ Petitioner attempts to give some meaning to the statute as he construes it by claiming that Section 922(o) shifts the burden of proof on registration from the government to the defendant in a criminal prosecution involving the possession of a machine gun. Pet. at 12-13. This interpretation lacks any support in either the text of the statute or its legislative history. Although, as discussed below, members of Congress repeatedly referred to Section 922(o) as a ban on the private possession of machine guns, they made no reference whatever to a desire to shift the burden of proof on the issue of registration and made no mention of any problem in proving the absence of registration in prosecuting violators.

As to the meaning of the exemption for transfers "by or under the authority of the United States," a colloquy between Senators Dole and Hatch eliminated any possible ambiguity. Senators Dole and Hatch discussed various factual situations in which this exemption might apply. Without exception, all involved sales to the military, police groups, defense contractors authorized to make weapons systems, or foreign governments. *Id.* at 9600-01. Absolutely no reference was made to private citizens possessing machine guns under the authority of government permits. Indeed, Senator Dole raised the question of whether the exemption was broad enough to allow a local police force to authorize its officers to purchase machine guns to be owned by the officer rather than the police department. Senator Hatch responded that it was, but that if the police officer left the force, the exemption would cease to apply and the machine gun would have to be transferred to "another entity authorized by the State or the United States to possess such weaponry." *Id.* at 9601. Neither Senator Dole's question nor Senator Hatch's response makes any sense if Section 922(o) permits the continued private possession of machine guns pursuant to government permits.

In enacting Section 922(o), Congress plainly did not believe it was merely maintaining the *status quo* with regard to machine gun regulation. Congress was confronted with evidence of the mounting use of machine guns as weapons of crime and pleas by police organizations to take steps to address the problem. Congress responded by freezing the number of machine guns in private hands that could be stolen and used to commit crimes.

II. FEDERAL LIMITS ON CIVILIAN POSSESSION OF MACHINE GUNS DO NOT VIOLATE THE SECOND AMENDMENT

The court below appropriately rejected without discussion petitioner's argument that the 1986 machine gun statute violates the Second Amendment to the Constitution. That ruling made no new Second Amendment law

and need not be reviewed by this Court. The federal courts have unanimously held that the Second Amendment guarantees the people's right to be armed for purposes of participating in an organized state militia, not the right to possess weapons for private purposes unrelated to the militia. This consistent judicial interpretation of the amendment is entirely in accord with the original intent of the Framers, as demonstrated by the constitutional debates. Moreover, even if the Second Amendment guaranteed a private right to be armed, the right would not be absolute, but would permit enactment of a machine gun ban as a reasonable regulation in the interest of public safety.

Before summarizing the well-established jurisprudence of the Second Amendment, the amici organizations wish to point out the frightening implications of petitioner's argument. Petitioner contends that the test for determining whether private possession of a given firearm is constitutionally protected is whether it is "ordinary military equipment," the use of which "could contribute to the common defense." Pet. at 27. Under petitioner's analysis the Second Amendment's protection would extend not only to possession of machine guns, but also to possession of bazookas, hand grenades, Stinger missiles, and any other weapon of mass destruction which an individual could "keep and bear" and which could have a military use. The public safety implications of such a position are truly staggering. No court has ever interpreted the Second Amendment as a restraint on the power of the federal government to restrict the dissemination of weapons of war among the general public.

A. Federal Case Law Uniformly Recognizes that the Second Amendment Does Not Guarantee An Individual Right to Possess Machine Guns for Personal Purposes Unrelated to the Operation of an Organized Militia

The Second Amendment to the United States Constitution reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to

keep and bear Arms, shall not be infringed." This Court's decision in *United States v. Miller*, 307 U.S. 174 (1939), establishes that the central concern of the Amendment is the protection of organized state militia, not personal possession of firearms.

In *Miller*, the Court held that the Second Amendment did not bar the prosecution of two individuals for transporting a sawed-off shotgun in interstate commerce without having registered the weapon as required by the National Firearms Act of 1934 ("NFA").¹² The Court found that the "obvious purpose" of the Second Amendment was to "assure the continuation and render possible the effectiveness of" state militia, and cautioned that the Amendment "must be interpreted and applied with that end in view." *Id.* at 178. The Court upheld the NFA as applied to sawed-off shotguns, noting that they bear no "reasonable relationship to the preservation or efficiency of a well regulated militia. . . ." *Id.*

Since *Miller*, the federal courts have consistently read the Second Amendment to guarantee the people's right to keep and bear arms for the purpose of participating in an organized state militia, not as a guarantee of a constitutional right to maintain armaments for personal, non-militia purposes.¹³ This remarkable unanimity among

¹² 26 U.S.C. §§ 5801-02 (1988).

¹³ See, e.g., *Quilici v. Village of Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1985); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977), *cert. denied*, 435 U.S. 926 (1978); *United States v. Graves*, 554 F.2d 65, 66-67 n.2 (3d Cir. 1977); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974); *United States v. McCutcheon*, 446 F.2d 133, 135-36 (7th Cir. 1971); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971); *Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1941), *cert. denied sub nom., Velazquez v. United States*, 319 U.S. 770 (1943); *United States v. Tot*, 131 F.2d 261, 266 (3rd Cir. 1942), *rev'd on other grounds*, 319 U.S. 463 (1943); *Thompson v. Dereta*, 549 F. Supp. 297, 299 (D. Utah 1982); *Vietnamese Fisherman's Assn. v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982); *United States v. Kozerski*, 518 F. Supp. 1082, 1090 (D.N.H. 1981), *cert. denied*, 469 U.S. 842 (1984).

the federal courts was aptly summarized by the United States Court of Appeals for the Eighth Circuit when it said that the argument for a "fundamental right to keep and bear arms" in the Second Amendment "has not been the law for at least 100 years." *United States v. Nelson*, 859 F.2d 1318, 1320 (8th Cir. 1988).¹⁴

Two decisions of this Court since *Miller* have reaffirmed this consistent interpretation of the Second Amendment.¹⁵ In *Burton v. Sills*, 394 U.S. 812 (1969), this Court dismissed, for want of a substantial federal question, a gun owner's appeal from a New Jersey Supreme Court decision upholding a state gun control law. The New Jersey Court had held that the Second Amendment "was not framed with individual rights in mind" but rather "refers to the collective right 'of the people' to keep and bear arms in connection with 'a well regulated militia.'" ¹⁶

In *Lewis v. United States*, 445 U.S. 55 (1980), this Court considered a challenge under the equal protection

¹⁴ State courts have been equally consistent in this view. See, e.g., *State v. Fennell*, 382 S.E.2d 231, 232 (N.C. 1989); *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C.), cert. denied, 108 S. Ct. 193 (1987); *Kalodimos v. Village of Morton Grove*, 470 N.E.2d 266, 278 (Ill. 1984); *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 432 P.2d 929, 930 (Nev. 1967); *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968), appeal dismissed, 394 U.S. 812 (1969); *Salina v. Blakesley*, 83 P. 619, 620 (Kan. 1905).

¹⁵ This Court's ruling in *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), relied upon by petitioner, is not to the contrary. There, the Court held that the fourth amendment guarantee against unreasonable searches and seizures does not protect foreign nationals residing in foreign countries. In reaching this conclusion, the Court commented that the phrase "the people" in the Bill of Rights "refers to a class of persons who are part of a national community. . . ." *Id.* at 1058. In no sense did the Court address the question whether the right granted this "class of persons" in the Second Amendment was a right to be armed as part of an organized state militia or a right to be armed for personal purposes unrelated to the "well regulated militia" or the "security of a free state."

¹⁶ *Burton v. Sills*, 248 A.2d 521, 526 (N.J. 1968), appeal dismissed, 394 U.S. 812 (1969).

clause to the federal prohibition against ownership of firearms by convicted felons. The Court applied the "rational basis" test rather than a stricter level of scrutiny to the statutory distinction between felons and non-felons because "[t]hese legislative restrictions on the use of firearms are neither based upon constitutionally suspect criteria, *nor do they trench upon any constitutionally protected liberties.*" *Id.* at 65, n.8. (emphasis added). The Court cited its holding in *Miller* that "the Second Amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'" *Id.* (quoting *Miller*).¹⁷

In holding that a sawed-off shotgun bears no reasonable relationship to a well-regulated militia, the Court found no reason to believe that such a weapon "is any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178. Petitioner takes this to mean that if a weapon is "ordinary military equipment" or *could* "contribute to the common defense," its possession is thereby protected from federal regulation by the Second Amendment. It is clear, however, that a weapon's theoretical military utility cannot by itself establish that its possession is protected by the Second Amendment. Nothing in *Miller* endorses the far-fetched and enormously dangerous argument that so long as a particular weapon *may* have military utility, its possession by *any member of the general public* is therefore necessary "to render possible the effectiveness" of state militia.

The lower courts unanimously reject the idea that *Miller* impliedly sanctions constitutional protection for

¹⁷ Petitioner mischaracterizes *Lewis* as holding only that felons are "not entitled to Second Amendment protection." Pet. at 28-29. As explained above, *Lewis* held that the constitutionality of the statutory prohibition of firearm ownership by felons is to be tested according to the less onerous "rational basis" level of scrutiny because the non-militia-related possession of firearms is not a constitutionally protected liberty.

private ownership of any weapon with a possible military use. In *Cases v. United States*, 131 F.2d at 916, the First Circuit conceded that the revolver at issue might have been "capable of military use," but rejected a Second Amendment challenge because there was "no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career." *Id.* at 923. Similarly, the Sixth Circuit, in *United States v. Warin*, 530 F.2d 103 (6th Cir.), *cert. denied*, 426 U.S. 948 (1976), upheld the registration requirement of the NFA as applied to machine guns, holding that to grant constitutional protection to private ownership of any military weapon would be "completely irrational in this time of nuclear weapons." *Id.* at 106.

The lower courts' unanimous conclusion that *Miller* does not guarantee the right of "all law-abiding persons," Pet. at 26, to possess military armaments is supported by the discussion of the nature of the constitutionally protected militia in *Miller*. In reviewing the history of the Second Amendment, the *Miller* opinion speaks of the "Militia which the States were expected to maintain and train" and which was "[a] body of citizens enrolled for military discipline." *Miller*, 307 U.S. at 178-79. The Court also reviewed the various colonial statutes requiring that militia members muster for service and that they maintain firearms for militia purposes. *Id.* at 180-81. Thus, the "well regulated militia" protected by the Second Amendment is an organized and trained military force under government direction and serving public purposes.¹⁸ It is the keeping and bearing of arms by persons enrolled in that military force—not by the citizenry at large—that the *Miller* Court held to be the central concern of the Second Amendment.

¹⁸ This Court's recent opinion in *Perpich v. Department of Defense*, 110 S. Ct. 2418, 2426 (1990), further confirms the nature of the constitutional militia as an active military force.

B. The Federal Courts' Unanimous "Militia" Interpretation of the Second Amendment Rests on Well-Established Historical Grounds

Ample historical support exists for the unanimous view of the federal courts that the intent of the Second Amendment was to preserve to the people, against encroachment by the federal government, a right to keep and bear arms for militia purposes.¹⁹

The Constitution was written at a time of tension between those favoring a strong central government with a professional standing army and those supporting state-controlled militia to preserve the people's security and liberty. Nowhere in the constitutional debates was there any discussion of a personal right to keep or bear arms for non-military purposes.

Many influential federalists, including George Washington, believed the militia had performed poorly during the war and were determined to establish either a professional standing army or a small, highly trained, centrally controlled militia.²⁰ Proponents of a strong national government worked for establishment of a professional army and simultaneously sought extensive central authority over the state militia to provide for uniformity in arms, discipline and training.²¹ In contrast, the antifederalists strongly opposed establishment of a standing army or the transfer of authority over the militia from the states to the central government. They viewed the state militia as a protection from oppressive federal government, par-

¹⁹ A detailed discussion of the historical origins of the Second Amendment is found in Ehrman and Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. Dayton L. Rev. 5 (1989).

²⁰ Letter of George Washington, September 24, 1776, reprinted in, Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 183 (1940).

²¹ See 5 J. Elliot, *Debates in the Several State Conventions* 440 (1836 ed.); 2 Farrand, *Records of the Federal Convention* 330-31 (1974).

ticularly given the proposed establishment of a national standing army.²²

The Militia Clauses of the original Constitution reflect a series of compromises, distributing power over the militia to both the state and federal governments.²³ One point critical to the antifederalists was, however, left unresolved: whether the power given to the federal government of arming and disciplining the militia was an *exclusively* federal power. If so, the antifederalists feared the possibility of disarmament of the militia through federal design or neglect.

The debate in the Virginia ratifying convention reflected the antifederalists' concerns. George Mason expressed the view that Article I, Section 8, Clause 16 of the Constitution gave the federal government exclusive power to arm the militia and prevented the states from doing so. Mason believed this exclusive power would allow Congress to destroy the militia by "rendering them useless by disarming them . . . congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for congress has an

²² See, e.g., the remarks of Elbridge Gerry: "By the edicts of an authority vested in the sovereign power by the proposed constitution, the militia of the country, the bulwark of defense, and the security of liberty, is no longer to be under the control of civil authority; but at the rescript of the Monarch. . . ." Gerry, "Observations on the New Constitution and the Federal and State Conventions, 1788," reprinted in, 3 B. Schwartz. *The Roots of the Bill of Rights* 487 (1980).

²³ The states were given the power to appoint officers and train the militia, while the federal government was granted the power to organize, arm and discipline the militia as well as govern them while they were in the service of the United States. U.S. Const., art. I, sec. 8, cl. 16. Congress was given authority to call forth the militia to execute national laws, suppress insurrections and repel invasions. U.S. Const., art. I, sec. 8, cl. 15. The President was made commander-in-chief of the militia during times they were in service of the federal government, U.S. Const., art. II, sec. 2, cl. 1., while the states retained authority when they were not in national service. See generally *Perpich*, 110 S. Ct. at 2418.

exclusive right to arm them, etc.”²⁴ Mason accordingly proposed a resolution calling for an amendment to the federal constitution that would expressly recognize the right of the states also to arm and discipline the militia.

Madison's initial draft of the Second Amendment read: “The right of the people to keep and bear arms shall not be infringed; a well armed but well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person.”²⁵ The Senate, rejecting a motion to add opposition to standing-armies in time of peace, dropped the religious exemption and rearranged Madison's original language, thus placing even greater emphasis on the militia aspect of keeping and bearing: “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”²⁶

C. Even if the Second Amendment Guarantees a Right to be Armed for Personal, Non-Militia Purposes, That Right Would Be Subject to Reasonable Legislative Regulation in the Interests of Public Safety

Even if one were to ignore the intent of the Framers and the overwhelming body of precedent establishing the “militia” purpose of the Second Amendment, one would still be left to determine the scope of the right guaranteed. In the 650 years of Anglo-American jurisprudence, no absolute right to be armed has ever been recognized. Rather any right to be armed has always been “subject to . . . well recognized exceptions arising from the necessities of the case,” including restrictions for public welfare and security. *Robertson v. Baldwin*, 165 U.S. 275, 281-82 (1897).²⁷

²⁴ Mason's remarks are quoted in 3 Elliot, *supra* note 21, at 379.

²⁵ See 5 B. Schwartz, *supra* note 22, at 1026.

²⁶ See “Senate Journal, Aug.-Sept. 1789,” reprinted in, 5 B. Schwartz, *supra* note 22, at 1149.

²⁷ In *Robertson*, this Court discussed several “well-recognized exceptions” to certain provisions of the Bill of Rights and stated

The necessity and propriety of regulating the possession and use of firearms was recognized at English common law as early as the fourteenth century, as well as in American colonial times. The Statute of Northampton, enacted in 1328, provided that no man shall "go nor ride armed by Night nor by Day in Fairs, Markets nor in the Presence of the Justices or other Ministers nor in no part elsewhere" ²⁸ The English Bill of Rights of 1689 made it clear that the right to be armed was subject to legislative control by providing that "subjects which are protestants may have arms for their defense suitable to their conditions *and as allowed by law.*" ²⁹ Various American colonies regulated firearms, including Massachusetts, Pennsylvania, South Carolina and Virginia.³⁰

In light of the frightening array of weaponry available in the modern era, no civil society could long exist in which individuals had an absolute right to own whatever armaments they chose. As Congress has recognized, machine guns represent an especially great threat to the public safety. If, contrary to the Framers' intent, the Second Amendment had created a personal "right to keep and bear arms," that right would plainly be subject to legislative action to limit the availability of combat weapons to the general public.

that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons." 165 U.S. at 281-82; *cf. Miller v. California*, 413 U.S. 15, 23 (1973) ("obscene material is unprotected by the First Amendment").

²⁸ 2 Edw. 3, ch. 3.

²⁹ 1 W. & M., sess. 2, ch. 2, *reprinted in*, 1 B. Schwartz, *supra* note 22, at 43 (emphasis added).

³⁰ Levin, *The Right to Bear Arms: The Development of the American Experience*, 68 Chi. Kent L. Rev. 148, 149-50 (1971).

III. CONGRESS HAS SUFFICIENT POWER UNDER THE COMMERCE CLAUSE TO PROHIBIT THE POSSESSION AND TRANSFER OF MACHINE GUNS WITHOUT REQUIRING A SPECIFIC CONNECTION WITH INTERSTATE COMMERCE

Petitioner relies on *United States v. Bass*, 404 U.S. 336 (1971), to challenge the constitutionality of Section 922 (o) as construed by the Bureau and the court below. Pet. at 22-25. In *Bass*, this Court interpreted a provision of federal law imposing penalties on a felon who "receives, possesses, or transports *in commerce or affecting commerce . . . any firearm.*" 18 U.S.C. § 1202(a) (emphasis added). At issue was whether the language "in commerce or affecting commerce" modified "receives" and "possesses" as well as "transports." If it did not, then the respondent could be convicted under Section 1202(a) for possession of firearms without a showing that the possession took place "in or affecting commerce." Because the Court found the statutory language and legislative history inadequate for divining Congressional intent as to how the statute was to be applied, 404 U.S. at 339-42, the Court read the provision narrowly in favor of the defendant. The Court found that the defendant could only be convicted upon a specific showing of a nexus between his possession of a firearm and interstate commerce. *Id.* at 347.

Petitioner's reliance on *Bass* in this case is wholly misplaced. Unlike the statute at issue in *Bass*, Section 922 (o) contains no requirement, ambiguous or otherwise, of a nexus between machine gun possession and interstate commerce. In *United States v. Nelson*, 458 F.2d 556, 559 (5th Cir. 1972), and *United States v. Lebman*, 464 F.2d 68, 72 n.11 (5th Cir.), *cert. denied*, 409 U.S. 950 (1972), the former Fifth Circuit rejected similar *Bass* challenges to two other provisions of the Gun Control Act of 1968 principally for the reason that they, like Section 922(o),

do not contain the requirement of a nexus with interstate commerce.³¹

Petitioner is fundamentally in error when he states that Congress does not have the power to prohibit the possession of machine guns unless "an effect on, or nexus with interstate commerce [is] an element of the offense." Pet. at 22. In *Perez v. United States*, 402 U.S. 146 (1971), the petitioner was convicted under a federal statute for "loan sharking" activities that took place in the State of New York. In upholding the conviction, the Court made clear that once Congress determines that "a class of activities" affects interstate commerce, it can regulate or prohibit each instance of such activity without "proof that a particular intrastate activity against which a sanction was laid had an effect on commerce." *Id.* at 152.

Congress has determined that firearms transactions are a class of activities that affect interstate commerce. Congress has declared that the "widespread traffic in firearms moving in or otherwise affecting interstate . . . commerce" can only be controlled through federal legislation.³² These findings clearly evidence Congress' intent to exercise power under the Commerce Clause to reach all

³¹ See also *United States v. Crandall*, 453 F.2d 1216 (1st Cir. 1972) (holding that *Bass* does not apply to 18 U.S.C. § 922(b) and that the absence of the requirement of an interstate commerce nexus does not make the provision unconstitutional). In *United States v. Evans*, 712 F. Supp. 1435, 1440 (D. Mont. 1989), appeal pending, No. 89-30188 (9th Cir.), the court held that Section 922(o)'s prohibition on the possession of a machine gun is a valid exercise of Congressional power under the Commerce Clause.

³² See Pub. L. No. 90-351, § 901(a), 82 Stat. 197, 225 (1968), reprinted in, 1 U.S. Code Cong. & Admin. News, 270-71 (1968). These legislative findings were originally contained in Title IV of the Omnibus Crime Control and Safe Streets Act of 1968, which was amended by the Gun Control Act of 1968. Although these findings were deleted as "unnecessary" in the Gun Control Act, they remain relevant for determining legislative intent. See *Lebman*, 464 F.2d at 70 n.4.

firearms activity regardless of the connection to interstate commerce of the particular transaction at issue.

CONCLUSION

Because this case presents no substantial question requiring resolution by this Court, and because there is no conflict among the circuits or state courts of last resort on any of the issues involved, *amici* urge that the petition for *certiorari* be denied.

Respectfully submitted,

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